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88-437

Supreme Court, U.S.
FILED
SEP 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

In the Supreme Court of the United States

October Term, 1988

TAYLOR LAWRENCE, d/b/a GRIZZLY and DALEY RANCH,

Petitioners,

v.

UNITED STATES OF AMERICA, ex rel. BRENT BERGEN and JOHN ERNST, WYOMING WILDLIFE FEDERATION and NATIONAL WILDLIFE FEDERATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Unlawful Inclosures Act can be construed, in light of its language, legislative history, and interpretation by the United States Supreme Court in *Leo Sheep Co. v. United States,* 440 U.S. 668, 59 L.E. 2d 677 (1979), to prohibit use of antelope-proof fences to bar antelope from foraging on private fee lands and leased grazing lands.

2. Whether a fence constructed on private fee lands to inclose public lands leased under the Taylor Grazing Act is in violation of the Unlawful Inclosures Act where the fence is not in violation of the terms of the grazing lease or any applicable regulations.

3. Whether fences with unlocked gates encompassing checkerboard private fee lands and public lands can be found to violate the Unlawful Inclosures Act in the absence of any claim or evidence that the fence was constructed with the intent to exclude entry by any member of the public with lawful access to the fence line and lawful entitlement to the use of the inclosed public lands.

4. Whether the right of passage across lands patented under the Union Pacific Railroad Act can be implied for antelope access to public lands under *Leo Sheep Co. v. United States,* 440 U.S. 668, 59 L.E.2d 677 (1979).

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In the Supreme Court of the United States

October Term, 1988

Taylor Lawrence, d/b/a Grizzly
and Daley Ranch,

Petitioner,

v.

United States of America, ex rel.
Brent Bergen and John Ernst,
Wyoming Wildlife Federation and
National Wildlife Federation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in Untied States of America, ex rel. Brent Bergen and John Ernst, et al. v Taylor Lawrence, d/b/a Grizzly and Daley Ranch, No. 86-1085.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Unlawful Inclosures Act can be construed, in light of its language, legislative history, and interpretation by the United States Supreme Court in *Leo Sheep Co. v. United States,* 440 U.S. 668, 59 L.E. 2d 677 (1979), to prohibit use of antelope-proof fences to bar antelope from foraging on private fee lands and leased grazing lands.

2. Whether a fence constructed on private fee lands to inclose public lands leased under the Taylor Grazing Act is in violation of the Unlawful Inclosures Act where the fence is not in violation of the terms of the grazing lease or any applicable regulations.

3. Whether fences with unlocked gates encompassing checkerboard private fee lands and public lands can be found to violate the Unlawful Inclosures Act in the absence of any claim or evidence that the fence was constructed with the intent to exclude entry by any member of the public with lawful access to the fence line and lawful entitlement to the use of the inclosed public lands.

4. Whether the right of passage across lands patented under the Union Pacific Railroad Act can be implied for antelope access to public lands under *Leo Sheep Co. v. United States,* 440 U.S. 668, 59 L.E.2d 677 (1979).

OPINIONS BELOW

The opinion of the United States District Court for the District of Wyoming has been reported at 620 F.Supp. 1414 (D.C. Wyo. 1985) and is appended hereto as

Appendix A. The opinion of the United States Court of Appeals for the Tenth Circuit has been reported at 848 F.2d 1502 (10th Cir. 1988) and is appended hereto as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals are dated and were entered on June 17, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The statutes involved are the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§1061-66, and the Taylor Grazing Act, 43 U.S.C. §§ 315 b, 315 c which are reproduced in Appendix C.

STATEMENT OF THE CASE

The United States Attorney for the District of Wyoming, pursuant to the Unlawful Inclosures of Public Lands Act, 43 U.S.C. §1061-1066 (hereinafter sometimes referred to as "UIA"), brought an action against Petitioner, Taylor Lawrence d/b/a Grizzly and Daley Ranch, concerning an antelope-proof fence constructed primarily on privately owned property. The Wyoming Wildlife Federation and National Wildlife Federation moved to intervene in the action and were so allowed by order of the United States District Court for the District of Wyoming. The United States asserted the fence precluded the public from access to the public lands inclosed by the fence and, therefore, the fence amounted to an unlawful inclosure under the Unlawful Inclosures

Act, and maintenance of the fence should be enjoined. The Wildlife Federations asserted not only was the public denied access in contravention of the UIA, but pronghorn antelope also were protected under the UIA and the antelope were being denied their statutorily protected access to the public lands encompassed by the fence, particularly, the area comprised of public and private lands referred to as "Red Rim". The parties entered into and filed with the District Court a factual stipulation that resolved all factual issues except the impact of the fence, if any, on the Baggs antelope herd.

The fence and lands which are the subject matter of this action are located in south-central Wyoming in Carbon and Sweetwater Counties, and are situated approximately ten miles southwest of Rawlins, Wyoming. A small portion of these lands are physically situated upon an escarpment of land referred to as "Red Rim".

The land ownership pattern in the area of the fence is one of mixed public and private ownership of alternating sections in a configuration generally known as "checkerboard". Taylor Lawrence is the owner of the surface of seventeen sections of land in the area and occupies portions of four other private sections of land within the perimeter fence line by agreement with other surface owners. In addition, Taylor Lawrence holds grazing leases from the State of Wyoming on two state-owned sections within the perimeter fence line. The remaining fifteen sections of land within the perimeter fence line, approximately 9600 acres, are unreserved public domain of the United States. This federal land is subject to grazing leases issued by the Bureau of Land Management to Taylor Lawrence under the provisions of the Taylor Grazing Act, 43 U.S.C. § 315 b and the

regulations promulgated thereunder. A map depicting the location of the fence and the pattern of land ownership can be found at 620 F.Supp. 1414, 1421 (Appendix A, page xvi).

The leases issued by the Bureau of Land Management to Taylor Lawrence allow him to graze cattle on the public lands as part of an operation which integrates public lands with private fee lands. The leases also allow Taylor Lawrence to inclose the lands either by range improvements on federal lands approved by permit or on adjoining privately held lands without permit.

The fence at issue is located on private lands held by Taylor Lawrence under surface patent or on leased patented lands of contiguous owners, except for three portions of the fence approximately two miles in total length, which the Bureau of Land Management (hereinafter sometimes referred to as "BLM") contended were on the public domain. Taylor Lawrence agreed to relocate those portions so the fence will lie wholly on private patented lands; in the meantime, he modified those two miles of fence to conform to BLM standards[1] pending relocation to private lands.

All of the public domain sections, except for seven sections, within the fence line are surrounded on all four sides by lands held by Taylor Lawrence under surface patents. None of these public lands can be reached without trespass on Taylor Lawrence's private fee lands.

[1]Pursuant to the Taylor Grazing Act, the BLM promulgated standards for fences for cattle operations are applicable only to federal lands. The "BLM-approved" design allows antelope to go over and under a fence.

The other seven sections are bounded on three sides by Taylor Lawrence's patented surface acreage and on the fence line (fourth side) by lands under surface patents or ownership of other private landowners. Access to those seven sections can be accomplished only by trespass on the private lands of Taylor Lawrence or other private landowners. In other words, all federal sections within the fence line are surrounded by privately owned lands without right-of-ways for public entry thereon, even in the absence of any fencing.

When Taylor Lawrence acquired the Daley Ranch in 1975, fences were in existence along a portion of the peripheral boundary. The fences conformed to BLM design standards and had been constructed either under BLM permit for range improvements or on the basis of fee surface ownership of the fence line for which no BLM permit was required. In 1979, Taylor Lawrence advised the Bureau of Land Management he planned to improve the forage capacity of his private lands by tilling and planting crested wheat grass. He also advised the BLM he planned to convert or supplement existing fences with fences of antelope-proof design in order to protect the crested wheat until it was firmly rooted in the ground. Mr. Lawrence also advised the BLM he would like to plant crested wheat on the public lands to be inclosed by his proposed fence.

The BLM's response, alluded to possible effects on antelope, and told Lawrence "he could not construct the fence on public land, but [the BLM] didn't think [it] could prevent him from crossing the fence at the section corners." Taylor Lawrence commenced converting the existing fence or erecting additional fence in the summer of 1979 and completed the project in the summer of

1983. He expended approximately $157,000.00 in reliance upon the BLM's responses.

The fence constructed consisted largely of a combination of woven-wire (commonly known as hogwire) and barbed-wire. The upper edge of the fence was approximately five feet above the ground. The fence was designed and constructed to prevent access by antelope throughout twenty-four and one half miles of its twenty-eight mile length, although approximately six and one-half miles of the fence can be and has been laid down to permit antelope crossing during the winter months when it has been asserted the Red Rim area is critical for the antelope. One and one-half miles of fence is a four barb fence; this conforms to the fence design approved by the BLM for public grazing land, although it is located on private, as opposed to public lands. (The design of this portion of the fence was determined by the requirements of the owner of the land on which the fence is located.) This one and one-half mile section of fence is open to antelope crossing. The other two miles of fence located on public domain lands have been modified to conform with BLM fencing standards pending its relocation on private land, and, consequently antelope can cross through this portion of fence as well.

There are twenty-seven cattle guards located in the peripheral fence. At each gate where a cattle guard exists, an adjoining gate exists without a cattle guard. At six points there are signs restricting entry, by whatever wording. These points are located on Taylor Lawrence's patented surface land. However, it was stipulated by the parties Taylor Lawrence has never excluded any person wishing access to public lands within the fenced perimeters, no matter what the purpose. This fact is also illustrated by the presence and entry upon the premises

by the persons from the Wildlife Federations who signed affidavits to commence the UIA action, as well as the numerous persons who testified concerning their presence on the premises, the fence and the antelope at the hearing conducted by the District Court.

Within the perimeter fence, there is a windswept area known as the "Red Rim". Red Rim is a sagebrush-covered winter feeding ground for antelope, particularly, during heavy snowpack periods. The total area known as "Red Rim" encompasses both private fee lands of Taylor Lawrence and public domain sections leased by him. In terms of the entire fenced area, Red Rim comprises only a small acreage, even though the entire area known as "Red Rim" is large in size.

At the request of the Wyoming Department of Game and Fish, Intervenor Wildlife Federation and the Governor of Wyoming, Taylor Lawrence permitted portions of his fence to be removed by and at the expense of the Wyoming Department of Game and Fish during the winters of 1983-84 and 1984-85. The fence was removed on the condition that it be replaced by early April of each year to retain livestock placed on the land by Mr. Lawrence for spring forage purposes. Pursuant to such authorization, several miles of fence were removed and replaced in the 1983-84 winter, and six and one-half miles were removed and replaced in the 1984-85 winter. Because of the practice of letting the fence down, the property within the perimeter of the fence has not been closed to antelope during any full year since completion of the fence at anytime during the calendar year when it is allegedly critical for antelope use.

There is no instrument of record at the Bureau of Land Management Records Office in Cheyenne or in the Recorder's Office of Carbon or Sweetwater Counties

which shows any easement across Taylor Lawrence's fee lands or across the contiguous fee lands of third parties abutting peripheral federal sections for access by the public or the antelope to inclose public domain sections.

Except for a period in 1983 when Taylor Lawrence leased hunting rights to the Bolten Ranch Company, Taylor Lawrence has permitted, and invited, members of the public with valid hunting licenses to enter on the public lands within the fence line as well as his private fee lands during the hunting seasons for hunting purposes. The only condition attached to that permission is that users of these lands close the gates during times cattle are contained within the peripheral fence and not cause harm to his livestock.

The Wildlife Federation sought removal of sixteen miles of the fence. Ten and three-quarters miles of such fence border or "inclose" private fee or leased state lands operated by Taylor Lawrence; only five and one-quarter miles border peripheral sections Taylor Lawrence holds under federal grazing lease, although located on private lands. The District Court determined this matter was controlled by *Camfield v. United States,* 167 U.S. 518 (1897) and ordered removal or modification of all twenty-eight miles of fence to permit antelope access to the public domain lands at every point along the fence without regard to the fence's location. The District Court further construed UIA to protect not only the access of persons to federal lands, but also the access of antelope.

On appeal the Court of Appeals affirmed the District Court's decision and concluded the fence violated the Unlawful Inclosures Act, relied upon *Camfield v. United States, supra,* and required all

twenty-eight miles of fence, even the portions inclosing private rather than public lands, to be removed or modified.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit raises important issues of federal law concerning millions of acres of public and private lands, most significantly those located in the western United States in the "checkerboard" configuration. These questions should be settle by this Court.

The decision of the Tenth Circuit is in conflict with the decisions of other federal courts of appeals on the same matter, specifically whether or not the intent with which a fence is erected "is of paramount importance" in determining whether the fence is in violation of the Unlawful Inclosures Act. If *Camfield v. United States, supra,* were to apply to the Lawrence fence, then the order of the District Court, as sanctioned by the Tenth Circuit has departed from the accepted, usual and express directive of that case when *all* of the fence rather than merely those portions "inclosing" federal sections were required to be removed or modified. This case requires the construction of the Unlawful Inclosures Act, and whether the access of antelope to public lands is protected by that act. Finally, this case raises issues as to which controls, the 1897 case of *Camfield v. United States, supra,* or the 1979 case of *Leo Sheep Company v. United States, supra,* a question which should be settled by this Court.

A. The Tenth Circuit Court of Appeals' decision regarding the intent with which a fence must be built to be in violation of the Unlawful Inclosures Act is incon-

sistent with the decision of this Court in Camfield v. United States, supra, and the decisions of the Ninth Circuit Court of Appeals and calls for an exercise of this Court's power of supervision to resolve the conflict.

The Tenth Circuit, in holding the Lawrence antelope-proof fence unlawful, found the *intent* with which the fence was erected to be irrelevant, and the *effect* of the fence on the public to be the decisive point. This finding was made although the parties stipulated no member of the public had been excluded from the public lands which are fenced, and the stipulation noted the public had been invited to use the public *and* private lands within the fence line. In the instant case, there was no evidence Taylor Lawrence had any motive or purpose in constructing the fence other than the bona fide protection of his private lands from an element which has no right of access across his private lands nor that his intent was to exclude the public from the public lands.

Camfield v. United States, supra, construed the UIA to authorize and empower the government to abate fences on private checkerboard lands as nuisances where the fences were constructed with the admitted purpose of surrounding vast areas of public land to secure exclusive possession of the public lands without claim of right or color of title. The *Camfield* court looked upon the fencing along the edges of the contiguous private land as serving no private purpose but "intended to enclose the government's lands," and concluded the fences were nuisances and abatable within the constitutional power of Congress as a "landed proprietor." *Camfield, supra,* at pp. 524-25. *Camfield, supra,* was decided during a period of free common grazing and use of public lands,

when the properties were open to settlement by members of the public. The *Camfield* case did not grant the public or antelope free access across private lands or any right in the government for public use across such private lands without payment of just compensation. *Anthony Wilkinson Livestock Company v. McIlquam,* 14 Wyo. 209, 83 P. 364 (1905); *United States v. Rindge,* 208 F. 611 (D.C. Cal. 1913); *see Stapp v. Nickels,* 434 P.2d 141, 144 (Mont. 1967). In the course of the opinion, the *Camfield* court stated, at p. 528:

> So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, *since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor;* . . . [Emphasis added.]

This extremely significant expression of the law subsequently resulted in the reversal in favor of the individual proprietor and against the government in *Golconda Cattle Co. v. United States,* 214 F. 903 (9th Cir. 1914.)

In *Golconda Cattle Co. v. United States, supra,* Golconda had constructed 40 miles of fence along 37,000 acres of land, 26,000 of which were public lands. The fence was, as in Lawrence's case, entirely on his private lands. The private lands completely surrounded the government lands. There were openings in the fence, varying from 90 feet to 3400 feet in length. The evidence showed the fence was built to protect Golconda's own lands, not to inclose federal properties. The Court felt the evidence showed the fences built upon his own lands were not built with the intent to inclose the government land "or to exclude the public from entering upon the public domain, either for purposes of settlement, grazing

or other uses . . . ." The Court acknowledged there were openings in the extensive fence which allowed passage to and from grazing lands and at points where public highways entered and left Golconda's lands. The Court felt "reasonable access by the public to public domain" had been given "for which reason the fences in question [could not] be properly held to unlawfully inclose the lands of the United States."

The *Golconda* Court stated, at p. 904, it had been in error in earlier following the decision in *Homer v. United States,* 185 F. 741 (8th Cir. 1911), in believing "that the question of intent with which the fencing was done could not be considered by the Court." The *Golconda* Court recognized the reverse was the law as held in *Potts v. United States,* 114 F. 52 (9th Cir. 1902); *Hanley v. United States,* 186 F. 711 (9th Cir. 1911); and *Camfield, supra.* In *Golconda, supra,* pp. 908-9, the Court found the fences in question were for the good faith protection of the individual proprietor's own private lands and permitted them to remain.

Under *Camfield* and the cases decided subsequently, the intent of the fence builder with regard to construction of the fence is of paramount importance. As evidenced by the correspondence with the BLM, there was no evidence in the record from which the court could conclude Lawrence had an ulterior motive or intent to exclude the public. If only people are protected from exclusion from public lands by the UIA, and the stipulated facts show people have not been excluded, then the inclosure cannot be illegal. The intent with which the fence is erected, not merely any effect that may be found, is of paramount importance. The Ninth Circuit has so held; the Tenth Circuit is in conflict therewith, and this situation calls for an exercise of the Court's supervision to resolve the conflict.

B. If Camfield v. United States, supra, controls, the decisions and orders of the Tenth Circuit and District Court have departed from the accepted and usual course of judicial proceedings in as much as Mr. Lawrence was required to modify or remove all of the fence, contrary to Camfield.

In concluding the fence was unlawful, the District and Tenth Circuit Courts relied on *Camfield, supra*. The District Court, and Tenth Circuit Court by affirming the lower court decision, has required Mr. Lawrence to remove or modify to BLM standards all twenty-eight miles of the fence. This order is in direct conflict with the exact case relied upon by the courts for their decisions.

There is no legal basis for requiring Mr. Lawrence to remove the 48 inch woven wire from *all 28 miles* of his fence and conform it to BLM standards for enclosure of cattle or remove it altogether. There is no legal basis for requiring the 10 ¾ miles of fence located on peripheral fee lands and leased state lands to be removed. The courts relied on *Camfield, supra,* yet ignored its conclusion. In *Camfield, supra,* at p. 525, this Court stated:

> So far as the fences were erected near the outside line of the odd-numbered sections [patented lands], there can be no objection to them.

Leo Sheep Co., supra, at pp. 689-90, further confirmed the grantee's right to fence his own land, quoting with approval from *Camfield* that:

> So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is enti-

> tled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the quise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute. . . .

While Mr. Lawrence contends this case is not governed by *Camfield, supra,* as the fencing of even-numbered sections is authorized pursuant to the grazing leases and Defendant's good-faith claim of leasehold title, under *Camfield, supra,* and *Leo Sheep Co.,* no basis exists under the Unlawful Inclosures Act or otherwise to require Mr. Lawrence to remove or modify the fence along the periphery of his own private lands or state lands he holds under lease. Accordingly, the Court's order that all twenty-eight miles of fence be removed or modified was a departure from the accepted and usual course of judicial proceedings, and the express holding of the case upon which the unlawfulness of the fence was premised, so as to require this Court to exercise its power of supervision.

C. Do antelope have a right of access to public lands which is protected under the Unlawful Inclosures Act as determined by the District Court and sanctioned by the Tenth Circuit Court?

Section 3 of UIA, (43 U.S.C. § 1063) provides:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence

on any tract of public land subject to settlement or entry under the public land laws of the United States, or *shall prevent or obstruct free passage or transit over or through the public lands: Provided,* this section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith. [Emphasis added.]

The emphasized language of Section 1063 is the language at issue in this case. The construction of this language must be made to determine whether or not, Congress intended, by this statute to create and protect the right of *antelope* to free passage and transit over or through the public lands and whether any attempt to obstruct that passage or transit by the use of an antelope-proof fence is a violation of the UIA.

The Unlawful Inclosures Act precludes only inclosures, the purpose of which is to exercise exclusive dominion or control over the public lands. On the lands in question, there were gates and cattleguards so access to the public land could be, and was, made by people. The evidence is uncontradicted, the public has not been excluded from the use of the public lands, nor access or transverse over them - even though the public sections were "landlocked" and no right-of-way in favor of the public exists over the private sections. There is nothing in section 1063 which requires Mr. Lawrence to provide access across his private lands to the antelope. Notwithstanding this, the evidence is uncontradicted that there are cattleguards and gates - as well as several miles of fence that *is not* antelope proof through which access can be made by the antelope.

Even if antelope were protected by UIA, the statute does not prohibit *all fences* and does not require access at *every* point along a fence. In *United States v. Johnston,* 172 F. 635 (C.C. Cal. 1908) a fence and natural barriers enclosed federal properties. Yet, there were gaps where access was available to the public. The court found the fence not to be in violation of UIA as there was access to the public - even though access did not exist at any and every point along the federal property boundaries.

Nothing in the Unlawful Inclosures Act precludes fencing as such. Where fences have openings and free access to people is not obstructed, no violation of the Unlawful Inclosures Act exists. Consequently, where a fence has open and unlocked gates and does not obstruct access to enclosed federal lands by anyone with lawful entitlement to their use, it is not an unlawful inclosure under the Act. *Golconda Cattle Co. v. U.S., supra,; United States v. Johnston, supra.*

It has long been held that the Unlawful Inclosure Act is violated only by inclosures that preclude entry on public lands by those entitled to access thereto and use thereof; it has not been construed to preclude one having fee title to checkerboard acreage from fencing his own acreage for his own use. *Golconda Cattle Co. v. U.S., supra; U.S. v. Rindge, supra.* It follows that an unlawful inclosure can only exist if it bars access to public lands by members of the public with lawful rights of access thereto. No such right exists across lands as involved here, in the absence of a contract or condemnation. Without such right there can be no violation of the Unlawful Inclosures Act as there is no lawful purpose or right to entry. In *Leo Sheep Co., supra,* p. 681, the Court stated that it was the intent of Congress to make grants

under the 1862 Union Pacific Railroad Act without any reservation of rights except those expressly reserved. The Court specifically rejected claims by the United States that it had implied rights of necessity or rights of access to public lands across private lands by reason of the Unlawful Inclosures Act.

All the public lands in issue here are surrounded by Union Pacific patents of the kind construed in *Leo Sheep Co., supra.* It was stipulated by the parties, moreover, that there is no instrument of record showing any easement across Lawrence's fee lands or across the contiguous lands of third parties for access by the public or the antelope to enclosed public domain sections.

The Unlawful Inclosures Act was enacted during a time period when the public lands of the United States were open to settlement under the homestead entry acts and other general laws of the United States. These acts were repealed in 1976 by the Federal Land Policy and Management Act ("FLPMA") 43 U.S.C. § 1702 et seq. UIA was enacted during a time period when there was an equal right of access for all persons to the free use of public lands for grazing or any other purpose. The Unlawful Inclosures Act was enacted in response to the need to protect the right of all persons, whether landed or not, to use the public lands, free of charge. It was also enacted at a time when, *Leo Sheep Co., supra,* had not been decided, where this Court determined there is no implied right of access to the public across private lands to public lands in the checkerboard configuration.

The Unlawful Inclosures Act, as its name, legislative history and language establish, was simply a fence act, and "[f]ence laws do not authorize wanton and willful trespass." *Light v. United States,* 220 U.S. 523, 537

(1911). It is apparent from the language of the UIA that the purpose of the Act was negative, *i.e.*, "to make unlawful any exclusive use and occupancy of any of the public lands, without claim or color of title or asserted right under the land laws, whether by inclosing the same or otherwise." *Bricker v. United States,* 169 F. 589, 591 (9th Cir. 1909). The UIA does "no more than to sanction free passage over the *public lands,* and to make the obstruction thereof by *unlawful means* a punishable offense." (Emphasis added). *McKelvey v. United States,* 260 U.S. 353, 359 (1922).

There are no words of grant to the United States in the UIA and no words of reservation of any interest to private lands. The UIA was purely remedial and contains no ambiguity that would permit the implication of some unexpressed purpose at variance with the terms employed by Congress. *Christner v. Poudre Valley Cooperative Association,* 235 F.2d 941, 950 (10th Cir. 1956); *United States v. Redmond,* 328 F.2d 707, 711 (6th Cir. 1964); *City National Bank of Lawton v. United States,* 207 F.2d 741, 744 (10th Cir. 1953). Moreover, it is obvious that such a drastic modification of property rights as contended by the Wildlife Federations and the Government, and adopted by the District and Tenth Circuit Courts, the right of antelope to protection under UIA to access to public lands, resulting in the crossing of the private lands of Taylor Lawrence, would clearly and specifically have been stated by Congress if so intended and not left to tortious implication from much more limited language.

The District Court relied on language in *Stoddard v. United States,* 214 F. 566 (8th Cir. 1914) that "any lawful purpose" entitles a person or antelope to seek passage over private lands to public lands. *Leo Sheep*

Co., supra, makes clear there is no absolute right for the public to cross/use private lands to access public lands. If people have no rights under UIA, how can antelope, short of an express reservation, which the parties have agreed does not exist. The legislative history for UIA lends credence only to a construction that *people* and their belongings were to be protected from interference with efforts to settle upon or to pass through government properties.

The District Court, and Tenth Circuit Court by sanctioning the District Court decision, erred in concluding the *Stoddard, supra,* recognizing the right of cattle to pass over public lands, necessarily supports the existence of such a right for antelope. Cattle are the property of persons. Their access to the public lands in the last half of the 19th century existed by reason of the right of individuals to graze their domesticated animals upon the public lands in common with others. Antelope, however, are *ferae naturae* with only such rights to move across checkerboard fee and public lands as may have been expressly reserved in the patenting of the fee lands and such as may have been prescribed by Congress or Department of the Interior regulation with respect to leased lands. The cases cited by the court, *Mackay v. Uinta Development Co.,* 219 F. 116 (8th Cir. 1914), and *Stoddard v. United States, supra,* say no more.

The *Stoddard* case, heavily relied upon by the District Court in discussing free passage or transit for "any and all lawful purposes" is not so broad as the proposition for which it has been cited. *Stoddard v. United States, supra,* involved UIA. Stoddard had constructed a barbed wire fence, which in conjunction with natural barriers, obstructed passage of cattle and horses to the public lands. The privilege of "free range for stock" for

cattle and horses was being denied to adjoining ranchers by the barriers/fence. Stoddard had acquired his fee lands from the railroad company; there were approximately 7000 acres of public lands.

The case involved the same phrase of 43 U.S.C. § 1063, as is involved in this case: "or shall prevent or obstruct free passage or transit over or through the public lands". . . . The appeals court found that the fence, in conjunction with the natural barriers, formed a barrier "to all free grazing by outside ranchers." Stoddard argued passage of cattle and stock was not protected by the UIA, and UIA applied only to people. The court, at p. 568, rejected that argument, stating:

> The act, in our opinion, was intended to prevent the obstruction of free passage or transit for any and all lawful purposes over public lands. It is a well-known fact that the *free herding and grazing of cattle* on the public lands is a legitimate use of which they may be put, and we think Congress must have had the preservation and protection of this use in mind in the enactment under consideration. [Emphasis added.]

The court goes on to say, in response to Stoddard's argument that the fence was on his private property:

> It in fact prevented and obstructed the free passage *over* public lands by *ranchers and their stock,* and except for the relief granted by the court below, would permit [Stoddard] to enjoy a monopoly of the grazing on the public lands. . . [Emphasis added.]

There is nothing in the Stoddard case that refers to or states antelope have a right of access or passage over

private lands. Because there is no easement or right-of-way in favor of the public over private lands, the passage of "ranchers and their stock" today would not be a lawful purpose. This is also true concerning passage of antelope.

There is nothing in the language or history of the Unlawful Inclosures Act which would allow one to come to the conclusion reached by the District Court, as sanctioned by the Tenth Circuit Court, that antelope have a right of access to public lands which is protected by the Unlawful Inclosures Act. Such a holding, would, in effect, because of the nature of antelope, impose a servitude upon patented private lands for the benefit of antelope. This is an important issue and question of federal law which has not, but should, be decided by this Court.

D. Which controls, Camfield v. United States, supra, or Leo Sheep Company v. United States, supra?

The District Court based its decision the Lawrence fence is unlawful under UIA upon *Camfield, supra.* The Tenth Circuit Court sanctioned that determination when it entered its order affirming the lower court. The Courts have stated the situations were "identical". True, the configuration of the fence looks the same; that, however, is where the similarity ends. *Camfield* arose in 1897 when public lands were open to settlement and there was in-common grazing; there was no BLM; no Taylor Grazing Act; no grazing permits or licenses. This case arises when all of those are present, and there are no longer homestead or entry laws. In the *Camfield* era, the grazing was free and in common; everyone had an equal right to bring their sheep, cattle, hogs and horses onto the federal lands to graze together. The question of the right to

cross private lands to public lands had not been resolved. In this case, the use of federal grazing lands is highly regulated. The right to use is restricted; *Leo Sheep Co.* has been decided, and there is no public right of access to public lands across private lands unless a right-of-way has been so established. Under *Leo Sheep Co.,* there is no implied easement of access across private lands to public lands.

The District and Tenth Circuit Courts rejected the application of *Leo Sheep Co., supra.* The interpretation of UIA by the Courts amounts to a seizure of private property for the use of antelope. The Courts' decisions require Lawrence to open lands, by removal or modification of all the fence, held by him in fee or under valid federal and state grazing leases, to antelope. The fact a portion of the Red Rim area encompassed by Lawrence's fee and leased lands may have a unique value for winter antelope forage does not justify their seizure for public use without an appropriate contract or acquisition by condemnation.

CONCLUSION

For the reasons stated herin, the petitioner respectfully prays the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, EX REL.
BRENT BERGEN and JOHN ERNST,
and Wyoming Wildlife Federation, a Wyoming non-profit corporation, and National Wildlife Federation, Distirct of Columbia non-profit corporation, Plaintiff-Intervenors.

Plaintiffs,

v.

TAYLOR LAWRENCE,
d/b/a GRIZZLY and DALEY RANCH,

Defendants.

No. C85-0136-B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Nov. 1, 1985.

United States brought action against cattle rancher alleging wrongful fencing of federal lad, and wildlife organization intervened as plaintiff. The District Court, Brimmer, Chief Judge, held that cattle rancher could not maintain fence constructed on private property which enclosed public lands and prevented lawful purpose of antelopes' access to their winter feeding range.

So ordered.

Richard A. Stacy, U.S. Atty. (on briefs), Francis L. Pico, Asst. U.S. Atty., D. Wyo., Cheyenne, Wyo., and Georgina Guy, Regional Sol., U.S. Dept. of the Interior,

Denver, Colo. (on briefs), for U.S.

Thomas D. Lustig, Boulder, Colo., and Rodger McDaniel, Cheyenne, Wyo., for plaintiff-intervenors.

Clyde O. Martz, Davis, Graham & Stubbs, Denver, Colo., and John A. MacPherson, Johnson, MacPherson & Noecker, Rawlins, Wyo. (on briefs), for defendant.

MEMORANDUM OPINION

BRIMMER, Chief Judge.

This case arises from the contentions of the United States and plaintiff-intervenors Wyoming Wildlife Federation and National Wildlife Federation (Wildlife Federations), that defendant has wrongfully fenced in federal land in violation of the Unlawful Inclosures of Public Lands Act, 43 U.S.C. §§ 1061-1066. At the hearing on plaintiff-intervenors' motion for preliminary injunction, with the agreement of counsel, the Court consolidated the matter into a full hearing of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2).

At the conclusion of the evidence and final arguments, the Court concluded that the Wildlife Federations upheld their burden of proof both for the preliminary injunction and upon the merits of the case, and orally granted their motion and ordered defendant to take down certain portions of the fence within ten days, and modify or remove the entire fence within sixty days. In order to ensure removal of the portions of the fence necessary to avoid a disaster to the antelope herd in case of an early onset of winter weather, the Court issued a written Order Granting Motion for Preliminary Injunction on October 29, 1985, setting that date as the beginning

of the ten day period. This memorandum opinion now conforms the oral Order and Order on Preliminary Injunction, and more fully sets out the reasoning of the Court.

Defendant owns a cattle ranch in the vicinity of Rawlins, Wyoming, and in the spring and summer months for about 60 days grazes his cattle on a combination of private, federal and state lands in the area of south central Wyoming known as Red Rim. Red Rim is an escarpment and uplifting plateau of approximately 22,000 acres, fifteen miles southwest of Rawlins, Wyoming, which lies just south of the railroad right-of-way granted to the Union Pacific Railroad in 1862. Red Rim contains an abundance of Wyoming big sagebrush, which, as testified to by Mr. Moody and Dr. Alldredge, is not eaten by cattle, but constitutes the major part of an antelope's diet, especially during winter. Due to Red Rim's geological features, winter winds blow the snow off this sagebrush, allowing the antelope to find food here when their other grazing areas are covered over with deep snow. The Wyoming Game and Fish Department has declared that portions of Red Rim constitute critical winter habitat for pronghorn antelope. *See* plaintiff-intervenors' exhibit number 11. The Baggs antelope herd which uses Red Rim for winter range is estimated to number 2,000 or more, and those 2,000 antelope have virtually no other alternative winter feeding grounds.

Red Rim, and defendant's Daley Ranch, are the legacy of a checkerboard ownership plan arising from the Union Pacific Railroad Act of July 1, 1862, c. 120, 12 Stat. 489, 492(3) and (4), *as amended* by Act of July 2, 1864, c. 216, 13 Stat. 356, 358(4). Pursuant to the Union Pacific Act, Congress transferred fee ownership of odd-numbered sections of land along the railroad lines to the

Union Pacific, and retained Federal ownership in the even-numbered sections. Defendant now has fee title or permission to fence from the title owner, to the Union Pacific sections in question, and has grazing permits on the odd-numbered federal and state sections. Defendant's fence, which covers 28 miles, is physically located on private land, except where it crosses at the common corners of state and federal sections, as shown on the attached diagram. (Stipulation Finding #14)

The matter in issue is quite simple. Defendant Lawrence contends that since the fence is located on his land, that he can construct it in any manner he chooses, without having to comply with Bureau of Land Management (BLM) requirements. Plaintiff-intervenors counter that since the fence encloses public lands, it violated the Unlawful Inclosures Act, unless the fence conforms with BLM standards promulgated pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 et seq. Those BLM standards require that fences for cattle operations provide a gap of at least sixteen inches at the bottom, with a bottom strand of smooth wire, so that antelope can crawl underneath, and with a top wire only thirty-eight inches high, to allow antelope to jump the fence when snow drifts block passage beneath the bottom strand. Defendant's fence on the other hand, is made of woven wire with no gap at the bottom, and is topped off with barbed wire at a height of five feet, making it, as defendant admits, antelope-proof. Joint Stipulation number 14 and Exhibit B.

In 1897 the United States Supreme Court dealt with an identical situation in *Camfield v. United States,* 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed.2d 260 (1897). Camfield acquired from Union Pacific the rights to several odd-

numbered private sections of land , and

> in building the fence complained of, the defendants had constructed it entirely on odd-numbered sections. . . so as to completely enclose all of the government lads aforesaid, but without locating the fence on any part of the public domain so included. *Id.* at 519, 17 S.Ct. at 864.

The Supreme Court considered Camfield's argument that he could do whatever he wished on his own land, and soundly rejected it. The Court found that the Unlawful Inclosures Act had been promulgated just to avoid such an outcome.

> If the Act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all "enclosures" of publiclands, by whatever means, that the Act becomes of any avail. *Id.* at 525, 17 S.Ct. at 867.

Finally, the Court concluded that defendant's intent, whether to irrigate the public lands or use them for pasturage, was unimportant. The only matter at issue was whether or not the fence violated the statute.

> The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion (sic) to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. . . . Considering the ob-

> vious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. *Camfield* at 525, 17 S.Ct. at 867.

The situation in this matter is virtually identical to that dealt with by the Supreme Court in *Camfield.* Although written in 1897, *Camfield* is still good law, and in fact was relied upon by the Supreme Court as recently as 1983 in *North Dakota v. United States,* 460 U.S. 300, 319, 103 S.Ct. 1095, 1106, 75 L.Ed.2d 77 (1983). While the defendant relies on four major arguments in an attempt to distinguish *Camfield,* the Court is convinced that none of these arguments take the facts of this case beyond the scope of *Camfield.*

Defendant first contends that *Camfield* is inapplicable because *Camfield* relies for its holding on the Unlawful Inclosures Act, (UIA), 43 U.S.C. § 1061 et seq., contends that the UIA does not apply to antelope. The portion of the UIA which is at issue here reads as follows:

> § 1063. *Obstruction of settlement on or transit over public lands.* No person, by force threats, intimidations, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of of public land subject to settlement or entry under the public land laws of the United

> States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

Because the UIA says no person shall "prevent or obstruct any person", defendant says that the Act only applies to humans, and that it is permissible for him to prevent antelope from crossing his fence. This argument might be valid except for the second clause of § 1063, which continues "or shall prevent or obstruct free passage or transit over or through the public lands." That clause does not contain the word "person", and neither does the Court believe that "person" from the preceeding clause should be read into it. Had Congress intended only to protect people, the first clause would have accomplished that purpose without necessity of the second clause.

In *MacKay v. Uinta Development Co.,* 219 F. 116 (1914), a Wyoming case decided by the Eighth Circuit Court of Appeals before the Tenth Circuit was created, the court held that there must be reasonable access for livestock to reach enclosed federal lands. Moreover, in *Stoddard v. United States,* 214 F. 566 (8th Cir. 1914), the Eighth Circuit specifically rejected the argument that defendant now presses this Court to embrace. In holding that the UIA did not apply only to humans, the Court held that the Act was intended to prevent the obstruction of free passage or transit for any or all lawful purposes over public lands. *Id.* at 568-69.

Surely, the free passage of hunters and their quarry is a lawful purpose for which the public may seek access to public lands. In light of these precedents the Court is hardpressed to understand how the UIA could apply to cattle, but not to antelope. In the words of the *Stoddard* Court, "[w]e think this is a forced and unwarrantable construction of the language employed." *Stoddard* at 568.

In the years since the 1885 passage of the UIA, the then-pressing concerns of settlement and range wars have faded. But, new present-day concerns have arisen. In the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., Congress set out new goals for the public lands, one of which is that

> the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals. . . 43 U.S.C. § 1701(a)(8).

Although FLPMA was promulgated long after passage of the UIA, it is certainly proper to consider FLPMA statute in light of UIA, especially since Congress as recently as 1984 considered and amended the UIA. *See, e.g., Zabel v. Tabb,* 430 F.2d 199 (5th Cir.1970), *cert. denied,* 401 U.S. 910, 91 S.Ct. 873 27 L.Ed.2d 808 (1971). In the Joint Stipulation of Facts, defendant has agreed that if allowed to stand, his fence might cause an increase in the winter kill of the Baggs antelope herd. At the Hearing on Preliminary Injunction the Court was thoroughly convinced by the undisputed testimony of Mr. Moody and Dr. Alldredge that not only is the enclosed portion of Red Rim critical winter range for the Baggs antelope herd, but that if the fence remains standing, the herd may very probably be decimated by

winter starvation. The Court cannot accept as the intent of Congress that the UIA would allow that outcome, when it is clear that defendant could not build his fence to prevent humans from undertaking mere recreational pastimes, such as hiking or fishing.

Defendant next contends that *Camfield* and the UIA don not apply to his fence because of the Taylor Grazing Act, 43 U.S.C. § 315 et seq. Defendant argues that since § 315c allows fencing directly on public lands under permit issued by the Secretary of the Interior, the UIA was implicitly repealed. This argument must fail. First, "repeals by implication are not favored, . . . [t]he intention of the legislature to repeal must be 'clear and manifest.' " [citations omitted]. *Watt v. Alaska,* 415 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981). There is no indication that Congress intended to repeal the UIA through passage of the Taylor Grazing Act, particularly when the UIA was amended as recently as 1984. Although the Grazing Act allows regulation of fencing on public land, it says nothing about fences on private land. The Grazing Act itself perpetuates the major purpose of the UIA, namely, access to public lands:

> Nothing contained in this chapter shall re-
> the . . . ingress or egress over the public lands
> in such districts for all proper and lawful pur-
> poses. . . . 43U.S.C. § 315e (1982).

If the Grazing Act repealed the UIA, the Government would be unable to achieve this purpose of the law because it would have no authorization to prevent unlawful enclosures erected on private lands. The Court is convinced that both the UIA and Grazing Act must be construed *in pari materia. See* Singer,

Sutherland Statutory Construction, 4th ed., chapters 51 and 53. The Grazing Act regulates fencing on public land, and unless fences on private land conform to these standards, the UIA prevents fences which wrongfully enclose public lands. Reading the statutes in this matter is consistent with the Supreme Court's ruling that "[w]e must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska,* 415 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981).

As an adjunct to this argument, defendant contends that the Bureau of Land Management (BLM) tacitly approved the fence, and that the Government should not now be allowed to complain. Although the Government waited almost two years before commencing this suit, the Court is not convinced that mere inaction constitutes approval. Moreover, the BLM's inaction was based not on approval, but on a mistaken belief that BLM lacked the power to prevent defendant from building the fence.

> We told [defendant] that he could not construct the fence on public land, but we didn't think we could prevent him from crossing the fence at the section corners. (June 29, 1979 BLM Memorandum, Stipulation Exhibit B.) . . . The existing allotment boundary fence would be modified as described above [to a sixty inch woven wire fence] on private land . . . The Bureau of Land Management cannot endorse the modification of the fence as proposed. (May 31, 1979 BLM letter to defendant, Stipulation Exhibit B.).

Language such as this does not constitute tacit approval of the fence by the BLM.

Defendant also contends that because he has leases to the enclosed public lands pursuant to the Taylor Grazing Act, he is not a mere trespasser, and thus is saved by the proviso in the UIA:

> § 1063 *Provided,* This section shall not be held to affect the right or title of person, who have gone upon, improved, or occupied said lands under the land laws of the United State, claiming title thereto, in good faith.

Defendant's argument is that because he has color of leasehold title, he has gone upon the lands under the land laws of the United States, and his fence is not illegal under the UIA. It, too, must fail.

In *Smith v. Third Nat'l Exchange Bank,* 244 U.S. 184, 37 S.Ct. 516, 61 L.Ed. 1071 (1917), the Supreme Court discussed the UIA proviso.

> It is a sufficient defence to such a [UIA] proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the power land office under the general laws of the United States. *Id.* at 190, 37, S.Ct. at 518.

Defendant makes no claim that the lands in question do not belong to the United States, or that he has any good faith claim to fee title to the lands because of his Taylor Grazing Act leases. In fact, § 315b of the Grazing Act itself forestalls such an assertion

> [t]he issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands. 43 U.S.C. § 315b.

Although defendant is not a bare trespasser, neither does he have any claim to color of title over the public lands in question. The UIA proviso does not save defendant's fence.

Neither is the fact that the fence is broken by 28 gates, 19 of which are unlocked, enought to take defendant's fence outside the scope of the UIA. Some of the locked gates have "No Trespassing" signs on them; and certainly none of the gates invite the public to come in. The Court is not entirely convinced that all of these gates provide adequate access for humans. However, the question at issue here is access by antelope. The testimony of Mr. Moody and Dr. Alldredge convinces the Court that gates, even if left open, make little or no difference to the antelope, which are creatures of habit that encounter a fence and will trail along it, totally missing small openings such as gates. *See* plaintiff-intervenors' exhibit number 7. It is not the fence itself, but its effect which constitutes the UIA violation. *McKelvey v. United States,* 260 U.S. 353, 43 S.Ct. 132, 67 L.Ed. 301 (1922). The clear, admitted, and intended effect of this fence is to exclude antelope. The presence of gates in it is unimportant.

Finally, defendant contends that *Camfield* and the UIA do not outlaw his fence because the Supreme Court's decision in *Leo Sheep Co. v. United States,* 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979), which involved a BLM effort to build a road crossing from one public section to another, usually but not always (because of terrain) at the common corner. There the Government contended, *inter alia,* that the Unlawful Inclosures Act prevented the Leo Sheep Company from contesting the Government's right to build a road across its land to provide public access to a reservoir area. The Supreme Court held that in order to build the road, which was in

part on private land and invite the public to use it, the Govvernment had to compensate the Leo Sheep Company for use of its land. But, in the opinion, the Court stated:

> Nor do we find the Unlawful Inclosures of 1885 of any significance in this controversy. That Act was a response to the "range wars," the legendary struggle between cattlemen and farmers during the last half of the 19th century. *Leo Sheep* at 683, 99 S.Ct. at 1411.

Defendant concludes that the Supreme Court held by this language that the UIA's purpose was to prevent the continuation of "range wars," and that it should not be extended beyond this purpose. That is not what the Court meant. The UIA indeed was a response to the range wars, but nothing in the act or its history limits its application in such a manner. If the UIA was only meant for such a limited purpose, the Court would have said so in *Camfield,* and Congress should have repealed it in 1934 when the Taylor Grazing Act was passes to end public lands disputes. Certainly Congress would not have amended the UIA in 1984 if the act was now useless.

Because *Leo Sheep* involved the Government's claim to an implied easement at the common corners of a checkerboard tract, the Court only concluded that *Camfield* and the UIA did not "suggest that the Government had the authority asserted here." *Leo Sheep* at 683, 99 S.Ct. at 1411. That does not mean that *Camfield* now has no applicability in this matter. As the *Leo Sheep* Court stated, "[t]hat case [*Camfield]* involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land. . . ." *Id.* at 683, 99 S.Ct. at 1411. Defendant has erected the same type of fence. Certainly *Camfield* is not applicable to a road question, but it clearly has much to say on the subject of

defendant's fence. The Court finds that while *Leo Sheep* has no applicability in this matter, *Camfield* is dispositive of it.

Thus, the Court concludes that this matter was decided by the Supreme Court in 1897 in *Camfield v. United States*. Defendant cannot maintain a fence which encloses public lands and prevents the lawful purpose of antelope access to their winter feeding range. The fence clearly constitutes a serious nuisance which must be abated in order to avoid disastrous consequences to the antelope which use Red Rim as winter range. The fence was built ostensibly to protect defendant's crop of crested wheat grass; but, in eight years the defendant has never planted that crop. The Court believes that he does not intend to, either. The fence has an ulterior purpose, and since the parties assured the Court that the mineral rights of that area were not involved, the only reason left for it is the exclusion of antelope from their winter range, which will result in decimation of that herd. The antelope grazed on the Wyoming big sagebrush at Red Rim long before the Daley Ranch was ever built, and unless driven to extinction, will graze there long after it is gone. The Court agrees with the Wildlife Federations that the Unlawful Inclosures Act must be read to avoid such an occurrence and to protect a unique wildlife resource like the Baggs antelope herd. Therefore it is

ORDERED that the Defendant, Taylor Lawrence, shall within 10 days from and after October 29, 1985 remove the 48'' woven wire from the fence at the places in the fence where it has been removed and laid down in the past two winters, in accord with the Order of this Court dated October 29, 1985. It is

FURTHER ORDERED that defendant Lawrence, within 60 days from the date of this Order, shall remove

the 48" woven wire from all 28 miles of his Red Rim fence and conform the fence to BLM standards, for enclosure of cattle, or remove it altogether. It is further

ORDERED that if defendant fails to compy with this Order and modify or remove the fence, he shall be in contempt of Court, and subject, from the sixty-first day on until complianc, to a fine of $1,000[1] per day. It is further

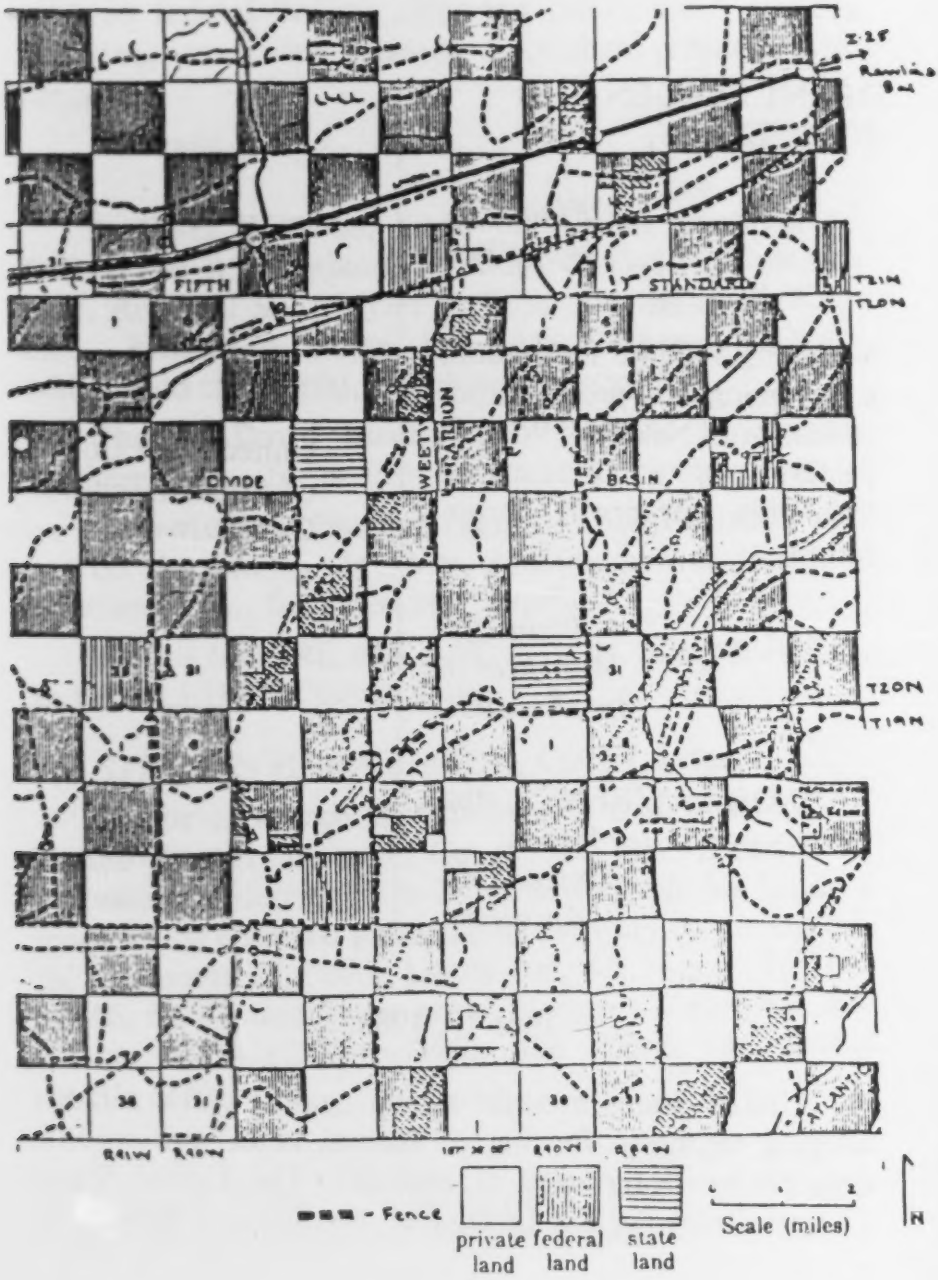
ORDERED that in the event defendant desires to appeal this decision, this Order may be stayed upon his filing of a supersedeas bond, cash or surety, in the amount of $120,000[2], but that if the defendant demonstrates to the Court that he has complied, and will continue to comply with the October 29, 1985 Order of Preliminary Injunction instructing him to remove the woven wire from those sections of the fence he has laid down in past years in agreement with the State of Wyoming, then this Order may be stayed upon filing of a supersedeas bond, cash or surety, in the amount of $1,000.

[1]Based on an estimate of 2000 antelope in the Baggs herd, at $.50 per head per day.

[2]Based on the median of $60 per head from the $15 charged for an in-state antelope hunting permit and the $105 charged for an out-of-state antelope hunting permit by the Wyoming Game and Fish Department.

EXHIBIT 1

SOURCE: U.S. Department of Interior, Bureau of Land Management Rawlins Quad (SE-13) (Revised April 1981). Adapted.



APPENDIX B

UNITED STATES OF AMERICA,
EX REL.,

BRENT BERGEN AND
JOHN ERNST,

Plaintiffs-Appellees,

and

Wyoming Wildlife Federation, a Wyoming non-profit corporation, and National Wildlife Federation, a District of Columbia non-profit corporation,

Plaintiffs-Appellees in Intervention,

v.

TAYLOR LAWRENCE, dba Grizzly and Daley Ranch,

Defendants-Appellant.

United State Court of Appeal, Tenth Circuit.

June 17, 1988.

United States brought action against cattle rancher alleging wrongful fencing of federal land, and wildlife organization intervened as plaintiff. The United States District Court for the District of Wyoming, Clarence A.

Brimmer, Chief Judge, 620 F.Supp. 1414, entered judgement. Rancher appealed. The Court of Appeal, Stephen H. Anderson, Circuit Judge, held that cattle rancher violated federal law by enclosing public lands thereby excluding pronghorn antelope from their critical winter range.

Affirmed.

. . . .

J. Carol Williams, Dept. of Justice, Washington, D.C. (Peter R. Steenland, Jr., Dept. of Justice, Georgina Guy, Regional Sol., Myles E. Flint, Deputy Asst. Atty. Gen., Richard A. Stacy, U.S. Atty., Cheyenne, Wyo. with her on the briefs), for plaintiffs/appellees.

Thomas David Lustig, Nat. Wildlife Federation, Boulder, Colo., for plaintiffs/appellees in intervention.

Catherine MacPherson (John A. MacPherson, with her on the briefs), Johnson, MacPherson & Noecker, Rawlins, Wyo., for defendant/appellant.

Before MOORE and ANDERSON, Circuit Judges, and PHILLIPS*, District Judge.

STEPHEN H. ANDERSON, Circuit Judge.

Taylor Lawrence appeals from a final order of the United States District Court for the District of Wyoming, ordereing him to remove from his lands a fence which enclosed public lands contrary to the Unlawful Inclosures of Public Lands Act, 43, U.S.C. §§ 1061 to 166. *See United States ex rel. Bergen v. Lawrence,* 620 F.Supp. 1414 (D.Wyo.1985). We affirm the district court's order.

*Hon. Layn R. Phillips, U.S. District Court for the Western District of Oklahoma, sitting by designation.

I.

Lawrence constructed a twenty-eight mile fence enclosing over twenty thousand acres of private, state and federal lands in an area of south central Wyoming known as the Red Rim.[1] The land in this area is owned in the familiar "checkerboard" pattern as the result of the federal land grant to the Union Pacific Railroad.[2] Lawrence has fee title or permission to fence from the title onwer of the private sections and has grazing permits on the federal and state sections. The fence enclosed 15 sections, or approximately 9,600 acres of unreserved public domain. However, the fence was constructed entirely on private lands, except where it crosses the common corners of state and federal sections.

Lawrence grazes his cattle on the Red Rim during the spring and summer months for about 60 days. But during the winter portions of the Red Rim provide critical range for Wyoming pronghorn antelope. The fence Lawrence constructed, however, was antelope-proof, denying antelope access to this critical winter range. The winter of 1983 was unusually severe (even for Wyoming) and the testimony to the district court indicated that antelope collected against the fence and starved in an unsuccessful attempt to reach the Red Rim.

The government brought this action under a statute adopted by Congress in 1885, the Unlawful Inclosures of Public Lands Act, 43 U.S.C. §§ 1061 to 1066 ("UIA"), seeking an order compelling removal of the fence or

[1]We adopt the statement of facts set forth by the district court, *Bergen*, 620 F.Supp. at 1415-16, and only briefly summarize those facts here.

[2]The Union Pacific Act of 1862 and the railroad land grants are explained by Justice Rehnquist in *Leo Sheep Co. v. United States*, 440 U.S. 668, 672-677, 99 S.Ct. 1403, 1406-1408, 59 L.Ed.2d 677 (1979).

modification to allow free and unrestricted access by pronghorn antelope to the enclosed public lands. [3] The Wyoming and National Wildlife Federations were joined as intervenors and moved for a preliminary injunction to have portions of the fence removed before the winter of 1985. At the hearing on the motion for a preliminary injunction, the district court consolidated the matter into a full hearing on the merits pursuant to Fed.R.Civ.P. 65(a)(2). At the conclusion of the hearing the court orally granted the preliminary injunction, ordering Lawrence to remove certain portions of the fence within 10 days and to remove the entire fence or modify it to conform with Bureau of Land Management ("BLM") standards [4] within 60 days. A few days later, the district court entered a final judgement and order directing that the entire fence be removed or modified. Lawrence appeals from the district court's order.

II

The district court concluded that this case was controlled by *Camfield v. Untied States,* 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1987) which dealt with a "virtually identical" situation. As the district court explained:

[3]The government's complaint also sought an order "to further allow ingress and egress by the public to the public lands enclosed within the fence." R. Vol. I, Tab 1 at 3. The district court did not determine whether the public had been denied access, *see Bergen,* 620 F.Supp. at 1419 ("The Court is not entirely convinced that all of these gates provide adequate access for humans. However, the question at issue here is access by antelope."), nor do we. The fact that the public lands were enclosed so as to restrict lawful forage by wildlife is sufficient for our decision here.

[4]Pursuant to the Taylor Grazing Act, BLM has promulgated standards for fences for cattle operations on federal lands, The "BLM-approved fence is designed to allow antelope to go under and over the fence.

"Camfield acquired from Union Pacific the rights to several odd-numbered private sections of land, and

'in building the fence complained of, the defendants had constructed it entirely on odd-numbered sections . . . so as to completely enclose all of the government lands aforesaid, but without locating the fence on any part of the public domain so included. *Id.* at 519, 17 S.Ct. at 864.'

"The Supreme Court considered Camfield's argument that he could do whatever he wished on his own land, and soundly rejected it. The Court found that the Unlawful Inclosures Act had been promulgated just to avoid such an outcome

'If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all "enclosures" of public lands, by whatever means, that the act becomes of any avail. *Id.* at 525, 17S.Ct. at 867.'

"Finally, the Court concluded that defendant's intent, whether to irrigate the public lands or use them for pasturage, was unimportant. The only matter at issue was whether or not the fence violated the statute.

"The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion (sic) to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute

> . . . . Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve as entry upon the lands of a private individual. *Camfield,* at 525, 17 S.Ct. at 867.'

"The situation in this matter is virtually identical to that dealt with by the Supreme Court in *Camfield.* Although written in 1897, *Camfield* is still good law, and in fact was relied upon by the Supreme Court as recently as 1983 in *North Dakota v. United States,* 460 U.S. 300, 319, 103 S.Ct. 1095, 1106, 75 L.Ed.2d 77 (1983)."

Bergen, 620 F.Supp. at 1416.

Lawrence was unsuccessful in his attempts to distinguish his fence from the fence in *Camfield.* He renews those attempts on appeal, challenging the district court's interpretation of the applicable law. The district court's rulings on legal questions are subject to de novo review, while determinations of factual questions are reversed only if they are clearly erroneous. *In re Tri-State Equipment, Inc.,* 792 F.2d 967, 970 (10th Cir.1986).

Initially, however, we must address Lawrence's characterization of the issue in this case. He argues that the order of the district court directing that the fence be removed or modified to allow passage by antelope imposes a "servitude" on his land, or grants the antelope an "easement" across them. Lawrence then argues that he must be compensated for this "taking." We disagree with Lawrence's description of the district court's order. In declaring that the fence must be removed, the district court did not grant the antelope any easement across Lawrence's private lands, nor do we. That question is

simply not at issue here. Instead, the issue in this case is merely whether the fence constructed and maintained by Lawrence unlawfully encloses federal law. Federal law declares such fences to be nuisances which must be removed.

In arguing that the district court's order creates an implied easement for antelope, Lawrence relies on *Leo Sheep Co. v. United States,* 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979), but we find that decision inapplicable here. *Leo Sheep* also involved the Union Pacific Railroad grant and land ownership checkerboard in Wyoming. The government cleared a road across public and private lands to provide public access ot the Seminoe Reservior, used by the public for hunting and fishing. When the private landowner sued for relief, this court held that Congress had implicitly reserved an easement across the private lands in the Union Pacific Railroad grant. *Leo Sheep Co. v. United States,* 570 F.2d 881, 885, (10th Cir.1977), *rev'd,* 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979). We relied, in part, upon the Unlawful Inclosures of Public Lands Act and *Camfield* to reach that decision. *Id.* at 886-88. But our decision was reversed by the United States Supreme Court, which found the UIA of no "significance in this controversy," *Leo Sheep,* 440 U.S. at 683, 99 S.Ct. at 1411, and held that neither the UIA nor the railroad grant reserved any easement for a public road across private lands. Thus, the government was required to compensate the Leo Sheep Company for the use of its land. In discussing the UIA, the Court noted that it was "a response to the 'range wars', " and the "the illegal fencing of public lands, which was often the product of the checkerboard pattern of railroad grants. By placing fences near the borders of their parts of the checkerboard, cattlemen

could fence in thousands of acres of public lands." *Id.* at 683-84, 99 S.Ct. at 1412.

Lawrence urges, based on *Leo Sheep,* that we find the UIA inapplicable here and follow the Supreme Court's holding rejecting any reserved easements in the Union Pacific land grant. Once again, we turn to the district court's analysis:

> "[Lawrence] concludes that the Supreme Court held . . . that the UIA's purpose was to prevent the continuation of 'range wars,' and that it should not be extended beyond this purpose. That is not what the Court meant. The UIA indeed was a response to the range wars, but nothing in the act or its history limits its application in such a manner. If the UIA was only meant for such a limited purpose the Court would have said so in *Camfield,* and Congress should have repealed it in 1934 when the Taylor Grazing Act was passed to end public land disputes. . . .
>
> "Because *Leo Sheep* involved the Government's claim to an implied easement at the common corners of a checkerboard tract, the Court only concluded that *Camfield* and the UIA did not 'suggest that the Government had the authority asserted here.' *Leo Sheep,* at 683, 99 S.Ct. at 1411. That does not mean that *Camfield* now has no applicability in this matter. As the *Leo Sheep* Court stated, '[t]hat case [*Camfield]* involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land. . . .' *Id.* at 683, 99 S.Ct. at 1411. [Lawrence] has erected the same type of fence. Certainly *Camfield* is not applicable to a road

question, but it clearly has much to say on the subject of defendant's fence."

Bergen, 620 F.Supp. at 1419-20. We find the district court's reasoning persuasive. In contrast, under Lawrence's reasoning, the UIA became superfluous as early as 1934 when the Taylor Grazing Act put an end to open public range, or at the latest in 1976 when the last of the homesteading acts was repealed by the Federal Land Policy and Management Act ("FLPMA"). Yet the UIA remains federal law, and was amended in 1984 when Congress modified a procedural provision.[5] We refuse to repeal the UIA by implication, *see Watt v. Alaska,* 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981) and therefore, must give effect to its provisions. The UIA declares enclosures of federal lands to be unlawful and orders that such enclosures be removed. It creates no easements or servitudes. Thus, Lawrence's central argument, that the antelope have no easement across his lands, is not relevant to our decision.[6] We conclude with the district court that "while *Leo Sheep* has no applicability in this matter, *Camfield* is dispositive of it." *Bergen,* 620 F.Supp. at 1420.

[5]In 1984, Congress deleted the provision from 43 U.S.C. § 1062 that any suit brought under the UIA had precedence for hearing and trial over other cases on the civil docket of the court and had to be tried and determined at the earliest possible date.

[6]While we do not decide this question, we note in passing that the Wyoming and National Wildlife Federations, as intervenor-appellees, make a strong case for distinguishing the antelope's right of access from the government's case in *Leo Sheep.* Accordingly, we are not saying that wildlife have no such rights relative to federal lands; we simply do not reach that question in this case. *Cf., e.g., Leo Sheep,* 440 U.S. at 687 n. 24, 99 S.Ct. at 1413 n. 24, (distinguishes *Leo Sheep* from Buford v. Houtz 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890)).

In a related argument, Lawrence claims that the district court's ruling effects an impermissible and unconstitutional taking:

> "The imposition of a public servitude on private property for antelope without payment of compensation violates the Fifth Amendment of the United States. If a statute should provide that one person may be compelled to allow antelope to use property privately owned without any requirement that compensation be paid to the owner, the statute would be unconstitutional."

Brief of Appellant at 22. We reject this argument for several reasons.

First, of course, we have already explained that the district court's decision did not impose a servitude for antelope, but rather, abated a nuisance proscribed by federal law. The government's power to act in this regard was settled by *Camfield:*

> "Considering . . . the necessities of preventing the enclosing of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of private individual. The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particual case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands

are thereby rendered less available for pasturage."

Camfield, 167 U.S. at 525, 17 S.Ct. at 867; *see also Mackay v. Uinta Development Co.,* 219 F. 116, 119 (8th Cir.1914). This power is not diminished where Congress acts to protect antelope rather than people. *Camfield's* characterization of the federal property power was recently reaffirmed with regard to wildlife by the Supreme Court in *Kleppe v. New Mexico,* 426 U.S. 529, 538, 96 S.Ct. 2285, 2291, 49 L.Ed.2d 34 (1976) where the Court upheld the constitutionality of the Wild Free-roaming Horses and Burros Act. *See also Minnesota v. Block,* 660 F.2d 1240, 1249, & n. 18 (8th Cir.1981) (Congressional power extends to conduct "on or off the public land"), *cert. denied,* 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982).

Second, we can find nothing of Lawrence's that has been "taken." Certainly, his federal grazing leases are not damaged as a portion of the animal unit months ("AUMs") for those leases is reserved for wildlife, presumably including antelope. Moreover, evidence at the trail indicated that competition between antelope and cattle was minimal. *See, e.g.,* R. Vol. II at 86 ("[A]t the time the pronghorn are in Red Rim in the winter, they are foraging almost strictly on sagebrush, which is something cattle rarely use."). There is also evidence in the record suggesting that foraging by antelope may actually improve the range for cattle. Even if there is some conflict, this court has already held that foraging by wildlife in the federal/private checkerboard in Wyoming is not a taking. *Mountain States Legal Foundation v. Hodel,* 799 F.2d 1423, 1429-32 (10th Cir.1986), *cert. denied.* — U.S. — , 107 S.Ct. 1616, 94 L.Ed.2d 800 (1987).

Finally, Lawrence retains the right to exclude antelope from his own lands if he can accomplish that exclusion without at the same time effecting an enclosure of the

public lands. [7] Again, *Camfield* states the law:

> "So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, re-]gardless of any detriment to his neighbor; but when, under the guise of enclosing his own land, he builds a fence which is useless to that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large."

Camfield, 167 U.S. 528, 17 S.Ct. at 867.[8] *See also Mountain States,* 799 F.2d at 1428 n. 8. All that Lawrence has lost is the right to exclude others, including wildlife, from the public domain—a right he never had.

[7]Lawrence retains the right to exclude the antelope at this time because the district court did *not* find any implied easement for antelope. If Lawrence attempts such an exclusion, an action might be brought claiming such an easement or servitude. At that time, this question would be proper for judicial consideration. We also recognize, as did the *Camfield* Court, that a separate enclosure for each of the square-mile sections of land owned by Lawrence is "scarcely a practical question." *Camfield,* 167 U.S. at 528, 17 S.Ct. at 868.

[8]Lawrence relies on this language, and other cases applying the UIA, to argue that the intent of the fence builder "is of paramount importance." We are not persuaded that intent is a controlling factor, or that it would matter here if it was. First, we note that *Camfield* was not concerned with the landowner's intent. *See Camfield,* 167 U.S. at 528, 17 S.Ct. at 868; *see also Homer v. United States,* 185 F. 741, 745 (8th Cir.1911) ("The statute itself . . . makes no mention of any specific intent. It condemns all inclosures.' "); *but see Golconda Cattle Co. b. United States,* 214 F. 903 (9th Cir.1914) (intent considered).

We now turn to Lawrence's efforts to distinguish his fence from the unlawful fence in *Camfield.* The heart of Lawrence's argument is that the UIA is simply inapplicable to antelope. The UIA provisions at issue provide as follows:

> "All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, . . . are hereby delcared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; . . ."

43 U.S.C. § 1061.

> "No person, by force, threats, intimidation, or by any fencing or inclosures, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, *or shall prevent or obstruct free passage or transit over or*

Camfield focused on the effect of the fence, not the landowner's intent. In this case, the effect of the fence is to exclude antelope from the public lands. In addition, the district court found that the *intent* of the fence was to exclude antelope. *Bergen,* 620 F.Supp. at 1420. That finding is not clearly erroneous. Thus, whether Lawrence's intent in building the fence is relevant or not, the fence is unlawful under the UIA.

> *through the public lands, Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

43 U.S.C. § 1063 (emphasis added).

The district court relied on the emphasized clause in section 3 to conclude that the UIA prohibition against enclosing public lands was not limited to people. According to the district court, "[t]hat clause does not contain the word 'person,' and neither does the Court believe that 'person' from the preceding clause should be read into it. Had Congress intended only to protect people, the first clause would have accomplished that purpose without necessity of the second clause." *Bergen,* 620 F.Supp. 1417.

We agree with the district court, but find additional reasons to extend the UIA to these circumstances. First, the language in section 1 is even more emphatic and absolute than that of section 3. According to the statute, "all inclosures of any public lands . . . are . . . declared to be unlawful." Lawrence points to the legislative history of the UIA, and finding no mention of wildlife, asks us to narrow the applicability of the statute. Because the language of the statute is clear, however, we do not have that option. "If a statute is clear on its face, there is no necessity to look to legislative history." *Jones v. Intermountain Power Project,* 794 F.2d 546, 552 (10th Cir.1986). *See also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the con-

trary, that language must ordinarily be regarded as conclusive.")'.[9]

We also find support to extend the UIA beyond in the early interpretations of the statute. [10] In *Mackay v. Uinta Development Co.,* 219 F. 116 (8th Cir.1914) the court relied on the UIA and *Camfield* to find that livestock may not be denied access to federal lands in the Union Pacific checkerboard. Even more instructive is the language of *Stoddard v. United States,* 214 F. 566 (8th Cir.1914). In *Stoddard,* as here, the defendant argued that section 3 of the UIA referred to "the obstruction of free passage or transit over the public lands of *persons* only." *Id.* at 568. The *Stoddard* court ordered removal of a fence on private land that obstructed the free range of livestock to public land, and like the district court here, refused to read the limitation to "persons" into that clause, and concluded that the UIA "was intended to prevent the obstruction of free passage or transit for *any and all lawful purposes over public lands,*" *Id.* at 568-69 (emphasis added).

Thus, the question becomes whether winter forage by antelope is a lawful purpose of public lands. Any doubt

[9] In addition, Lawrence's references to the legislative history of the statute are inconclusive. These is no indication that wildlife was *not* meant to be protected, merely an emphasis on the interests of homesteaders and livestock. In the face of clear statutory language, the fact that the legislative history does not mention a congressional intent to prohibit fences excluding wildlife from public lands does not convince us to so limit the statute. Even if we agreed that the only purpose of the UIA was to provide access for homesteaders, we would be forced to apply the statute here, for "the plainer the statutory language, the more convincing the contrary legislative history must be before the court follows the purpose over the literal words." *Medler v. Bureau of Reclamation,* 616 F.2d 450, 453 (9th Cir.1980).

[10] The district court also relied on these early cases. *See Bergen,* 620 F.Supp. at 1417-18.

may be resolved by reference to FLPMA, where Congress directed that "the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals." 43 U.S.C. § 1701(a)(8).

Lawrence objects to the reliance on FLPMA to ascertain the limits of the UIA: "It is absurd to suppose that 1976 declarations of Congress regarding public land administration could be construed to amend by implication the langauge and purpose of the UIA enacted in 1885." Brief of Appellant at 38-39. This criticism misses the point of the analysis. Neither this court nor the district court rely on FLPMA to *amend* the UIA. The UIA proscribes unlawful when they deny access to public lands for "lawful purposes"; Congressional guidance in FLPMA is relevant to assist the court in determining what uses of the public lands are lawful, and therefore protected under the UIA. Obviously, lawful uses of the public lands will change over time. For example, as Lawrence notes, the primary purpose of the UIA in the early part of this century was to prevent the exclusion of homesteaders from the public lands. With the repeal of the homesteading laws, that is no longer a "lawful purpose." The district court did not look to FLPMA to determine the intent of Congress in 1885, but rather, to determine what "lawful purposes" were protected by the UIA in 1985. That was both appropriate and necessary.

Second, Lawrence claims that the passage of the Taylor Grazing Act distinguishes his fence from the one in *Camfield*. The argument takes several forms.

The UIA includes one statutory defense: There is no unlawful enclosure where the defendant has a claim or color of title to the enclosed lands that was acquired in good faith. *See* 43 U.S.C. §§ 1061, 1063. Lawrence claims that, by virtue of his Taylor Grazing Act leases of the

federal lands enclosed by the fence, he has color of leasehold title, rendering the UIA inapplicable. However, the cases interpreting this defense consistently rely on color of *fee* title. *See, e.g., Smith v Third Nat'l Exchange Bank,* 244 U.S. 184, 37 S.Ct. 516, 61 L.Ed. 1071 (1917); *Cameron v. United States,* 148 U.S. 301, 13 S.Ct. 595, 37 L.Ed. 459 (1893). We see no reason to abandon that interpretation. In addition, the language of the Taylor Grazing Act negates Lawrence's claim, for "[t]he issuance of a [grazing] permit . . . shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b.

Lawrence also argues that a fence enclosing public lands leased under the Taylor Grazing Act is not an unlawful enclosure where the fence is not in violation of the terms of the lease or grazing regulations. Because Lawrence constructed the fence on his private lands, he maintains that the BLM fencing regulations did not apply to his fence and therefore, he did not violate his lease terms or the regulations. Thus, while Lawrence concedes that BLM may regulate fences constructed on federal lands, he disputes the extension of those regulations to fences on private lands, and argues that the district court had no authority to order the fence modified to meet BLM standards. This is merely a variation of Camfield's argument to the Supreme Court in 1896. Camfield argued that the UIA could not reach his fence, as it was constructed on private land. The Court disagreed:

> "If the act be construed as applying only to fences actually erected on public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'enclosures' of public lands, by whatever means, that the act becomes of any avail."

Camfield, 167 U.S. at 525, 17 S.Ct. at 867. If the Government can demand removal of a fence on private land, certainly it may order the fence modified to abrogate the "enclosing" effect that makes the fence unlawful.

Moreover, the Taylor Grazing Act reinforces the UIA's mandate that access to public lands be preserved: "Nothing contained in this subchapter shall restrict the . . . ingress and egress over the public lands . . for all proper and lawful purposes . . ." 43 U.S.C. § 315e. The district court sought to read the provisions of the UIA and Taylor Grazing Act together " 'to give effect to each . . . while preserving their sense and purpose.' " *Bergen,* 620 F.Supp. at 1418 (quoting *Watt v. Alaska,* 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981)). We believe the district court's ruling accomplishes this goal. As noted above, the UIA preserves access to federal lands for "lawful purposes," including forage by wildlife.[11] Where a fence is constructed so that it does not obstruct other lawful uses of the federal lands, it is not an unlawful enclosure.[12]

[11]As we have noted, some of the AUMs on the enclosed public land were reserved for wildlife. The fence effectively precluded the use of these reserved AUMs, thus, we are not prepared to accept Lawrence's assertion that the fence was not in violation of the Taylor Grazing Act or his lease terms. Lawrence claims that the parties stipulated that the fence did not violate the lease of regulations. The Wildlife Federations disagree. *See* Brief for Intervenors/appellees at 41 n. 59. We find nothing in the stipulations that directly supports Lawrence's claim, although the BLM did not believe it could control construction of the fence on private land. *See Bergen,* 620 F.Supp. at 1418. In either event, this point is not central to our decision, and we have no reason to decide whether Lawrence was in compliance with his grazing lease and the Taylor Grazing Act regulations.

[12]In a related argument, Lawrence argues that the district court had no authority to require removal or modification of the entire 28 miles of fence. We believe that the district court's order is within the authority

Finally, Lawrence claims that because the fence includes several unlocked gates, there is no unlawful enclosure absent evidence that the fence excludes entry by members of the public with "lawful entitlement to use of the enclosed public lands." Initially, we note again that the district court did not reach the question of public access. *See supra* note 3. The court found, however, as a matter of fact, that the fence did exclude antelope. *Bergen,* 620 F.Supp. 1419. [13] That finding is not disputed by Lawrence. He merely restates his premise that antelope have no right of access, and argues from that premise that the presence of unlocked gates and the possibility of public access renders the fence lawful. We have already held that the UIA applies to wildlife as well as people. It follows that Lawrence's antelope-proof fence is prohibited by the UIA.

There are additional reasons to reject this argument. The mere presence of gates or openings in a fence does *not* mean the enclosure is lawful. As the district court concluded, "[i]t is not the fence itself, but its effect which constitutes the UIA violation." *Bergen,* 620 F.Supp. at 1419. Even the fence in *Camfield* included swinging gates at the section lines to afford access, yet the Court found

granted by the statute and *Camfield. See* 43 U.S.C. § 1062 ("[I]f the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.").

[13]Once again the district court's analysis is instructive: "Neither is the fact that the fence is broken by 28 gates, 19 of which are unlocked, enough to take [Lawrence's] fence outside the scope of the UIA. Some of the locked gates have 'No Trespassing' signs on them; and certainly none of the gates invite the public to come in. The Court is not entirely convinced that all of these gates provide adequate access for jumans. However, the question at issue here is access by antelope. The

that fence unlawful. *Cf. Stoddard,* 214 F. at 568 (fence must be removed despite openings). Of course, not every fence is a violation of the UIA. Lawrence relies upon *Golconda Cattle Co. v. United States,* 214 F. 903 (9th Cir.1914), where a fence was allowed to remain, but in that case, the court found that access was sufficient:

> "While those fence were very extensive, amounting in the aggregate to about 40 miles in length, various openings were left in them at points most frequently used by cattle and other animals in their passage to and from the grazing lands of the United States, and at points at which the public highways entered and left the appellants' lands, which openings were nine in number, the widest of which was 3,400 feet in width, and the narrowest 90 feet; . . . Such openings, . . . in our opinion admitted of reasonable access by the public to the public domain, for which reason the fences in question cannot be properly held to unlawfully inclose the lands of the United States."

*Id.*at 909. In contrast, here the court found that the gates were clearly insufficient to allow access by antelope and refused to find that public access was unhamperd by the fence.[14]

testimony of Mr. Moody and Dr. Allredge convinces the Court that gates, even if left open, make little or no difference to the antelope, which are creatures of habit that encounter a fence and will trail along it, totally missing small openings such as gates. . . . The clear, admitted, and intended effect of this fence is to exclude antelope. The presence of gates in it is unimportant." *Bergen,* 620 F.Supp. at 1419.

[14]We are similarly unpersuaded by other cases citied by Lawrence. *See, e.g., Potts v. United States,* 114 F. 52, 55 (9th Cir.1902) ("evidence

Finding no reason to distinguish this case from *Camfield,* we agree with the district court "that this matter was decided by the Supreme Court in 1897 in *Camfield v. United States.* [Lawrence] cannot maintain a fence which encloses public lands and prevents the lawful purpose of antelope access to their winter feeding range." *Bergen,* 620 F.Supp. at 1420.

III.

Lawrence also raises objections to the preliminary injunction entered by the district court. First, Lawrence claims that the district court improperly allowed evidence concerning the impact of the fence on antelope. To obtain an injunction, the moving party must show, *inter alia,* that "the movant will suffer irreparable injury unless the injunction issues." *City of Chanute v. Kansas Gas & Elec. Co.,* 754 F.2s 310, 312 (10th Cir.1985). The evidence which Lawrence objected to addresses that question. It also tends to show that Lawrence's fence denied a lawful use of federal lands. In addition, Lawrence demonstrates no prejudice from the district court's ruling on this evidence. We find no error on this point, nor do we find any flaw in the final judgment. Contrary to Lawrence's assertion, the district courts' order was based on a finding that the fence violated the UIA, not on the harm to the antelope.

tends to show that no public land had actually been inclosed by the fence of the defendant alone"); *United States v. Rindge,* 208 F. 611, 622 (S.D.Cal.1913) ("[S]ince . . . the public lands can be reached without crossing the ranch, the fences in question do not constitute an inclosure. . . ."); *Anthony Wilkinson Livestock Co. v. McIlquam,* 14 Wyo. 209, 83 P. 364, 367-68 (1905) ("Cases arising out of the unlawful inclosure of government lands are not applicable to the case at bar. . . . Defendant has not inclosed government land, and none of its fences will prevent or obstruct free passage or transit over or through the public lands in question. . . .").

Lawrence's other complaints about the preliminary injunction are moot. "With the entry of the final judgment, the life of the preliminary injunction came to an end, and it no longer had a binding effect on any one. The preliminary injunction was by its very nature interlocutory, tentative and impermanent." *Madison Square Garden Boxing, Inc. v. Shavers,* 562 F.2d 141, 144 (2d Cir.1977) (citing *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F2d. 738, 742 (2d Cir.1953)); *see also Ameron, Inc. v. U.S. Army Corps of Engineers,* 610 F.Supp. 750, 757 (D. N.J. 1985) ("Where . . . a final judgment has been entered on the merits, the preliminary injunction comes to an end and is superseded by the final order."), *aff'd on rehearing as modified,* 809 F.2d 979 (3d Cir.1986). The district court entered the final judgment a few days after the preliminary injuction. That judgment superseded the preliminary injunction and was the subject of this appeal.

Finding no error in the district court's final judgment, that order is AFFIRMED.

APPENDIX C

UNLAWFUL INCLOSURES OR OCCUPANCY; OBSTRUCTING SETTLEMENT OR TRANSIT, 43 U.S.C. §§ 1061-1066.

§ 1061. Inclosure of or assertion of right to public lands without title

All inclosures of any public lands in any State of Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the Unites States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited. (Feb. 25, 1885, c. 149 § 1, 23 Stat. 321.)

§ 1062. Suits for violations of law

It shall be the duty of the United States attorney for the proper district on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor be governmental subdivisions of surveyed lands, but

only so that the inclosure may be identified, and the persons quilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court. (Feb. 25, 1885, c. 149, § 2, 23, Stat. 321; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 1, 62 Stat. 909; Nov. 8 1984, Pub.L. 98-620, Title IV, § 402(43), 98 Stat. 3360.)

§ 1063. Obstruction of settlement on or transite over public lands

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall

prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in goof faith. (Feb. 25, 1885, c. 149, § 3, 23 Stat. 322.)

§ 1064. Violations of chapter; punishment

Any person violating any of the provisions of this chapter, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed quilty of a misdemeanor and fined in a sum not exceeding $1,000, or be imprisoned not exceeding one year, or both, for each offense. (Feb. 25, 1885, c. 149, § 4, 23 Stat. 322; Mar. 10, 1908, c. 75, 35 Stat. 40.)

§ 1065. Summary removal of inclosures

The President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of the public lands mentioned in this chapter, and to employ civil or military force as may be necessary for that purpose. (Feb. 25, 1885, c. 149, §5, 23 Stat. 322.)

§ 1066. Permission of Secretary to sue

Where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this chapter without authority from the Secretary of the Interior. (Feb. 25, 1885, c. 149 § 6, 23 Stat. 322.)

Taylor Grazing Act;
43 U.S.C. §§ 315b, 315c.

§ 315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to fixed or determined from time to time in accordance with governing law. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the

discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purpose and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands. (June 28, 1934, c. 865, § 3, 48 Stat. 1270; Aug. 6, 1947, c. 507, § 1, 61 Stat. 790; Oct. 21, 1976, Pub.L. 94-579, Title IV, § 401(b)(3), 90 Stat. 2773.)

§ 315c. Fences, wells, reservoirs, and other improvements; construction; permits; partition fences

Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by

the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations fo the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. (June 28, 1934, c. 865, § 4, 48 Stat. 1271.)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-437

In The

Supreme Court of the United States

October Term, 1988

TAYLOR LAWRENCE, d/b/a GRIZZLY
AND DALEY RANCH,

Petitioner,

v.

UNITED STATES OF AMERICA,
WYOMING WILDLIFE FEDERATION,
AND NATIONAL WILDLIFE FEDERATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL AND WYOMING WILDLIFE FEDERATIONS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a fence, constructed on private checkerboard land, whose principal intent and effect are to encircle and block antelope access to intermingled private and 9,600 acres of federal land, violate the Unlawful Inclosures of Public Lands Act of 1885 ("UIA")?

2. May Congress abate such a fence where the private landowner retains the right to exclude antelope from his own land, where wildlife use of the entire checkerboard is customary and necessary, where no diminution of private property was shown, and where the landowner has not bothered to invoke a state statute, which would compensate him for any damage done his land by wildlife?

3. Is a violation of the UIA excused because the fence owner holds sixty-day federal grazing leases to the encircled federal sections, when the fence precludes use of forage specifically reserved for wildlife in those federal leases?

RULE 28.1 LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Respondent Wyoming Wildlife Federation is a Wyoming non-profit corporation. The Wyoming Wildlife Federation is affiliated with approximately sixteen Wyoming sportsmen and conservation clubs.

The National Wildlife Federation ("NWF") is a District of Columbia non-profit corporation. NWF has two "subsidiaries:" National Wildlife Federation Endowment, Inc., and Wildlife Publications, Inc., both based in Washington, D.C. NWF also holds a majority interest in DeSoto Greetings, Inc., a Maryland Corporation. The National Wildlife Federation Endowment, Inc. also owns an interest in Sq.181, Inc., a District of Columbia Corporation. NWF has fifty "affiliates," one in each state except Maryland and Washington, as well as the Virgin Islands and Puerto Rico. Each affiliate is an environmental/conservation organization, like the Wyoming Wildlife Federation.

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STATEMENT OF THE CASE

Petitioner Lawrence's portrayal of the facts (Petition at 3-10) significantly deviates from the lower courts' findings in five instances:

1. First, the rancher fails to disclose the effect of his antelope-proof fence on wildlife, saying only the Bureau of Land Management ("BLM") "alluded to possible effects on antelope," (Petition at 6); that it was "asserted the Red Rim area is critical for the antelope," (Petition at 7); and that "the property within the . . . fence has not been closed to antelope . . . at anytime [sic] during the calendar year when it is allegedly critical for antelope use." Petition at 8.

In reality – as found by the lower courts – Petitioner's fence has been and will continue to be catastrophic to antelope in South Central Wyoming. To begin with, the BLM warned Lawrence "that a fence of this kind on the antelope winter range could have disasterous [sic] effects on the antelope population. . . ." Joint Stipulations of the Parties, Exhibit B, 29 June 1979 Memo.

The Tenth Circuit found Lawrence's fence blockaded the antelope's critical winter range during the severe winter in late 1983, with terrible effects:

> The winter of 1983 was unusually severe (even for Wyoming) and the testimony to the district court indicated that antelope collected against the fence and starved in an unsuccessful attempt to reach the Red Rim.

United States ex rel. Bergen v. Lawrence, 848 F.2d 1502, 1504 (10th Cir. 1988). Finally, the district court established

both the critical importance of Red Rim to antelope,[1] and the risk should Lawrence's fence remain:

> At the Hearing on Preliminary Injunction the Court was thoroughly convinced by the undisputed testimony of Mr. Moody and Dr. Alldredge that not only is the enclosed portion of Red Rim critical winter range for the Baggs antelope herd, but that if the fence remains standing, the herd may very probably be decimated by winter starvation.

United States ex rel. Bergen v. Lawrence, 620 F. Supp. 1414, 1417 (D. Wyo. 1985).

2. Second, Lawrence represents his fence was erected in order to "plant[] crested wheat grass . . . [and] protect [it] until it was firmly rooted in the ground." Petition at 6. This allegation is at odds with the district court's finding:

> The fence was built ostensibly to protect defendant's crop of crested wheat grass; but, in eight years the defendant has never planted that crop. The Court believes that he does not intend to, either. The fence has an ulterior purpose, and since the parties assured the Court that the mineral rights of that area were not involved, the only reason left for it is the exclusion of antelope from their winter range, which will result in decimation of that herd.

Lawrence, 620 F. Supp. at 1420.

3. Third, Lawrence suggests his BLM grazing leases to the federal sections enclosed by his fence excuse his

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[1] "The Wyoming Game and Fish Department has declared that portions of Red Rim constitute critical winter habitat for pronghorn antelope. . . . The Baggs antelope herd which uses Red Rim for winter range is estimated to number 2,000 or more, and those 2,000 antelope have virtually no other alternative winter feeding gounds." *Lawrence*, 620 F. Supp. at 1415.

UIA violation. Petition at 15. But he fails to disclose that despite an explicit reservation of forage for wildlife (antelope) in his leases, his fence precluded use of that reserved forage. The Tenth Circuit reached this conclusion, although it felt it irrelevant to the UIA violation:

> As we have noted, some of the AUMs on the enclosed public land were reserved for wildlife. The fence effectively precluded the use of these reserved AUMs, thus, we are not prepared to accept Lawrence's assertion that the fence was not in violation of the Taylor Grazing Act or his lease terms. . . . In either event, this point is not central to our decision, and we have no reason to decide whether Lawrence was in compliance with his grazing lease and the Taylor Grazing Act regulations.

Lawrence, 848 F.2d at 1510 n.11. While Lawrence claims his federal leases "also allow Taylor Lawrence to inclose the lands . . . by range improvements . . . on adjoining privately held lands without permit" (Petition at 5), he neither now nor has he ever cited to that provision in his lease. Respondents can find no such permission in the leases.

4. Fourth, Lawrence claims "there are cattle guards and gates – as well as several miles of fence that *is not* antelope proof through which access can be made by the antelope." Petition at 16 (emphasis original). His representation is contrary to the findings of the Tenth Circuit and district court, which found those openings provide no succor to starving antelope trying to reach food in winter:

> The testimony of Mr. Moody and Dr. Alldredge convinces the Court that gates, even if left open, make little or no difference to the antelope, which are creatures of habit that encounter a fence and will trail

> along it, totally missing small opening [sic] such as gates. . . . The clear, admitted, and intended effect of this fence is to exclude antelope. The presence of gates in it is unimportant.

Lawrence, 848 F.2d at 1511 n.13, *citing Lawrence*, 620 F. Supp. at 1419.

5. Finally, Lawrence asserts "[n]one of these [enclosed] public lands can be reached without trespass on Taylor Lawrence's private fee lands." Petition at 5. To the extent antelope might cross Lawrence's land to reach federal sections, that is not a trespass because antelope use of the land long preceded Lawrence's,[2] and, in any event, antelope have an easement by necessity to cross those lands.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

This case represents a terrible but unique chapter in western wildlife history, where a rancher claims the right to starve thousands of antelope with no apparent gain to

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[2] Antelope use of Red Rim is an old custom predating private ownership of these lands. The district court found that "[t]he antelope grazed on the Wyoming big sagebrush at Red Rim long before the Daley Ranch was ever built, and unless driven to extinction, will graze there long after it is gone." *Lawrence*, 620 F. Supp. at 1420.

[3] Testimony before the district court showed that if antelope are to survive severe winters, they have no alternative other than to use Red Rim. The district court's finding is set out in note 1, *supra*.

himself. Hopefully, it is an isolated case which will rarely recur, since few would attempt such wanton destruction.

More unique than the facts of this case is the remedy, the Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-66 (1982). In the last fifty years federal courts cited the UIA just four times. Only twice was there any analysis of the statute, and only in this case was it found relevant.

Nor is there any deviation from past teachings of this Court which should prompt review. The Tenth Circuit recognized and followed this Court's teaching in *Camfield v. United States*, 167 U.S. 518 (1897) (a virtually identical fence found to violate the UIA) and *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

For these reasons, elaborated below, Respondents Wildlife Federations request the Petition for Certiorari be denied.

1. There is no conflict between the Ninth and Tenth Circuits in their application of the UIA. Both followed this Court's direction in *Camfield*.

Petitioner tries to paint a conflict between the Tenth Circuit's decision below and the Ninth Circuit's holding in *Golconda Cattle Co. v. United States*, 201 F. 281 (9th Cir. 1912), *rev'd on reh'g*, 214 F. 903 (9th Cir. 1914). Lawrence claims the Tenth Circuit "found the *intent* with which the fence was erected to be irrelevant, and the *effect* of the fence on the public to be the decisive point." Petition at 11 (emphasis original). He then asserts this conflicts with the Ninth Circuit, which, he says, subscribes to the view that the intent behind the fencing must be considered. Petition at 13.

To begin with, Lawrence mischaracterizes – and seeks to escape from – the Tenth Circuit holding. He does not mention the circuit court would have found his fence in violation of the UIA even if intent were a crucial factor. The Tenth Circuit wrote:

> We are not persuaded that intent is a controlling factor, or that it would matter here if it was. . . . In this case, the effect of the fence is to exclude antelope from the public lands. In addition, the district court found that the *intent* of the fence was to exclude antelope. *Bergen*, 620 F.Supp. at 1420. That finding is not clearly erroneous. Thus, whether Lawrence's intent in building the fence is relevant or not, the fence is unlawful under the UIA.

Lawrence, 848 F.2d at 1508 n.8 (emphasis original).

Aside from mischaracterizing the Tenth Circuit's finding about his own intent, Lawrence seeks to heighten the perceived conflict by forgetting that although the *Golconda* court considered intent, the decision was grounded on the effect of the fence, as was the Tenth Circuit's. As *Golconda* held:

> While those fences were very extensive . . . various openings were left in them at points most frequently used by cattle and other animals in their passage to and from the grazing lands of the United States. . . . Such openings . . . admitted of reasonable access by the public to the public domain, for which reason the fences in question cannot be properly held to unlawfully inclose the lands of the United States.

Golconda Cattle Co., 214 F. 903, 909 (9th Cir. 1914). The *Golconda* court found no violation of the UIA because there was no effect of enclosing federal land – quite different from the federal land blockade in this case.

Instead of the divergence Petitioner Lawrence seeks to depict, both circuits have followed this Court's guidance in *Camfield*. Indeed, the Tenth Circuit looked directly to *Camfield* for guidance on this question: "First, we note that *Camfield* was not concerned with the landowner's intent. *Camfield* focused on the effect of the fence, not the landowner's intent." *Lawrence*, 848 F.2d at 1508 n.8 (citation omitted).

This Court has already clarified that it is the effect of the fence which spawns violations of the UIA, regardless of the fencebuilder's motivation:

> If they have enclosed the public lands in violation of the statute it is no answer to say that they have enclosed them for irrigating as well as for pasturage purposes. The violation of the statute is none the less manifest from the fact that the defendants had an ulterior purpose, or a purpose other than that of pasturage.

Camfield at 528.

Lawrence's real argument – which prompts his attempt to obscure the intent issue – is that although he intended to exclude antelope from federal lands, and accomplished it with devastating effectiveness, he did not intend to exclude people from those lands. This, he believes, should excuse his violation of the statute. The failure of this excuse is discussed in § 3, *infra*, showing antelope access is protected by the UIA.

2. The order below – requiring Lawrence to remove or modify all twenty-eight miles of his illegal fence – is not contrary to this Court's teaching in *Camfield*. Rather, it is the same remedy ordered in *Camfield*, and is supported by the evidence.

Lawrence's second attempt to gain review is to insist the order below, which required he remove or modify all

twenty-eight miles of his fence, is contrary to this Court's instructions in *Camfield*. Petitioner claims "[t]here is no legal basis for requiring Mr. Lawrence to remove . . . *all 28 miles* of his fence. . . . The courts relied on *Camfield* . . . yet ignored its conclusion." Petition at 14 (emphasis original). To support this proposition, Lawrence extracts a sentence from *Camfield* out of context and with it attempts to restrict the Court's jurisdiction to only those portions of the fence which were erected immediately outside the federal sections. There are three flaws in his attempt.

First, Lawrence's assertion is vitiated by the actual relief granted by the *Camfield* district court and not disturbed by this Court. Rather than requiring removal of only certain portions of the fence, as Lawrence suggests, the *Camfield* decree provided:

> And that said defendants do so absolutely remove and abate said fences, and *every part and parcel therof* within thirty days after the date of this decree; . . . and each and every of them be and hereby are forever and absolutely enjoined . . . from keeping . . . or supporting said fences and barriers *or any part or parcel thereof*. . . ."

Transcript of the Record, No. 15,912, Camfield v. United States, filed May 23, 1895, at 15 (of the printed version), containing the Decree of the District Court (emphasis added).

Second, when this Court stated there could be no objection to fences erected "near the outside line of [privately owned] sections," *Camfield* at 525, it was not sanctioning fencing schemes such as Camfield's and Lawrence's. Rather, this Court inquired into the fence's effect – if the fencing scheme blocked or enclosed federal

lands, it violated the UIA, even if located on private lands.

Third, the district court's order is supported by § 2 of the UIA, giving it discretion to determine the amount of the fence to be removed: "In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way. . . ." Here the district court made a factual finding that the entire fence must be removed to allow antelope access, based upon expert testimony that infrequent openings in the fence are insufficient to afford antelope access to the enclosed federal lands. *Lawrence*, 620 F. Supp. at 1419-20. This finding was confirmed by the Tenth Circuit. *Lawrence*, 848 F.2d at 1511 n.13. Lawrence has introduced no evidence to show that this finding was clearly erroneous.

3. There was no error in the Tenth Circuit's conclusion that the UIA guarantees access to federal land for legitimate purposes, and antelope use of federal land is such a legitimate use.

Lawrence's third attempt to present a certworthy issue centers around his belief that the decisions below – holding the UIA protects antelope access to federal lands – are wrong. Lawrence claims Congress never intended "to create and protect the right of *antelope* to free passage and transit over or through the public lands. . . ." Petition at 16 (emphasis original). However, Petitioner's argument fails, as the Tenth Circuit recognized, on the most obvious of grounds – the statute's plain meaning.

A. The plain meaning of the UIA shows it guarantees access to federal land for legitimate purposes, regardless of the entity seeking access.

The Petition does little to challenge the Tenth Circuit's decision on the scope of the UIA. The circuit court noted three indicators of the statute's breadth. First, § 1063 provides:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or entry under the public lands laws of the United States, or *shall prevent or obstruct free passage or transit over or through the public lands.* (Emphasis added.)

Both the district and circuit courts held because the second clause, unlike the first, does not limit protection only to "persons," Congress intended to guarantee free access to federal land without reference to the entity seeking access. *Lawrence*, 620 F. Supp. at 1417; *Lawrence*, 848 F.2d at 1508.

Second, the Tenth Circuit held the language in § 1061, declaring "all inclosures of any public lands . . . to be unlawful," even more emphatically demonstrated a broad guarantee to access to federal lands for legitimate purposes, and not just a right for *people* to reach those lands. *Lawrence*, 848 F.2d 1508-09. "Because the language of the statute is clear," the Tenth Circuit held it did not have the option of delving into the UIA's legislative history.[4] *Lawrence*, 848 F.2d at 1509.

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[4] While the Tenth Circuit felt it had no option to consider the UIA's legislative history, it nonetheless found "Lawrence's

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Third, the courts below found "support to extend the UIA beyond people in the early interpretations of the statute." *Lawrence*, 848 F.2d at 1509 (footnote omitted). None of the cases Petitioner presents alters the view that the UIA was intended "to prevent the obstruction of free passage or transit for *any and all lawful purposes over public lands*." *Lawrence*, 848 F.2d at 1509, *citing Stoddard v. United States*, 214 F. 566, 568-69 (8th Cir. 1914) (emphasis added).

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references to the legislative history of the statute [to be] inconclusive. There is no indication that wildlife was *not* meant to be protected, merely an emphasis on the interests of homesteaders and livestock." *Lawrence*, 848 F.2d at 1509 n.9 (emphasis original).

A more detailed examination of the statute's facilitation of homesteaders would show Congress intended to protect wildlife under the UIA. The right of homesteaders to access federal land would have been nugatory without the presence of wildlife on the land. Homesteaders were vitally dependent on wildlife for their food ("For centuries [antelope] furnished meat, hides, and tableware for the plains Indians. Then the whites came, and for a few decades antelope steaks were the most common palatable meat on the bill-of-fare along the covered wagon routes from the Mississippi to California and Oregon." V. Cahalane, *Mammals of North America* 69 (1961)); clothing ("For the cold winter months, animal skins were carefully preserved by the settlers to be fashioned into heavy leather coats, hats and shoes. The tough hide of the buffalo was particularly useful. . . . Buffalo robes shut out the terrific cold of the western winters." J. Stratton, *Pioneer Women* 68 (1981)); and even fuel (Buffalo chips were burned during the winter to keep noninsulated cabins warm. *Id.* at 62).

Congress would not pass a law to guarantee settlers the right to homestead federal land, and then fail to protect the means to survive once they arrived.

B. Foraging on and passage over federal land by antelope are legitimate uses of that land.

Given prior determinations that the UIA guarantees access to public lands for "lawful purposes," and the Tenth Circuit's affirmation of that view, it only remained to decide whether antelope grazing on BLM land was such a lawful purpose. The Tenth Circuit found any doubt about the legitimacy of this use was laid to rest in the Federal Land Policy and Management Act ("FLPMA") where Congress directed " 'the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals.' 43 U.S.C. § 1701(a)(8)." *Lawrence*, 848 F.2d at 1509.

Buttressing this statutory imprimatur of the antelope's legitimate use of federal land are Petitioner's grazing leases. Although they specifically reserved federal forage for antelope, Lawrence's fence precluded their ever reaching it. *Lawrence*, 848 F.2d at 1510 n.11.[5]

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[5] Despite this abuse of his grazing leases to the encircled federal land, Petitioner nonetheless suggests they give him "good-faith claim of leasehold title" (Petition at 15), which excuses his UIA violation under § 1061's exception for "claim or color of title made or acquired in good faith." The Tenth Circuit held the "color of title" statutory defense covers only color of *fee* title. *Lawrence*, 848 F.2d at 1510. That Lawrence's leases do not confer color of *fee* title is affirmed by the statute authorizing the leases, the Taylor Grazing Act: "The issuance of a [grazing] permit . . . shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b (1982).

Moreover, the Taylor Grazing Act prohibits restricting "ingress or egress over the public lands . . . for all proper and

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4. The Tenth Circuit's decision – that removal of the fence does not take Lawrence's lands without just compensation – is consistent with this Court's holdings.

Lawrence's final justification for a writ of certiorari is a claim that "the right of antelope to protection under [the] UIA to access to public lands, resulting in the crossing of the private lands of Taylor Lawrence," would result in a "drastic modification of property rights. . . ." Petition at 19. He insists the holdings below impliedly confer such a right for antelope passage. This, he writes, is contrary to the holding in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), that "there is no implied easement of access across private lands to public lands." Petition at 23. Accordingly, he reasons, requiring removal or modification of his fence results in a "seizure of private property for the use of antelope . . . without an appropriate contract or acquisition by condemnation." Petition at 23.

Lawrence's allegation – that antelope now have the right to cross his lands – can only come from a sloppy reading of the decision. In reality, the Tenth Circuit explained that "the district court did not grant the antelope any easement across Lawrence's private lands, nor

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lawful purposes." 43 U.S.C. § 315e. It also bars interference with "hunting or fishing." 43 U.S.C. § 315. These provisions militate against using the Taylor Grazing Act to excuse Lawrence's fence.

do we." *Lawrence*, 848 F.2d at 1505. The court held Lawrence "retains the right to exclude antelope from his own lands if he can accomplish that exclusion without at the same time effecting an enclosure of the public lands." *Lawrence*, 848 F.2d at 1507.

Aside from this critical oversight, Lawrence's claim that there will be a seizure of his property without compensation turns the facts of this case on their head. It is the rancher's antelope-proof fence that excludes wildlife from federal lands, even though Congress has explicitly provided for that use in FLPMA,[6] in the Taylor Grazing Act,[7] and even in Lawrence's leases.[8] "All that Lawrence

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[6] There is no question that wildlife use of public lands is a lawful purpose – FLPMA declares "it is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of . . . ecological . . . values . . . [and] that will provide food and habitat for fish and wildlife and domestic animals. . . ." 43 U.S.C. § 1701(a)(8).

[7] 43 U.S.C. § 315e provides: "Nothing contained in this subchapter shall restrict . . . ingress or egress over the public lands in such districts for all proper and lawful purposes." 43 U.S.C. § 315 provides: "Nothing in this subchapter shall be construed as in any way . . . vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district." As the district court noted: "Surely, the free passage of hunters *and their quarry* is a lawful purpose for which the public may seek access to public lands." *Lawrence*, 620 F. Supp. at 1417 (emphasis added).

[8] The Tenth Circuit noted "some of the AUMs on the enclosed public land were reserved for wildlife. The fence effectively precluded the use of these reserved AUMs, thus we are not prepared to accept Lawrence's assertion that the fence was not in violation of the Taylor Grazing Act or his lease terms." *Lawrence*, 848 F.2d at 1510 n.11.

has lost is the right to exclude others, including wildlife, from the public domain – a right he never had." *Lawrence*, 848 F.2d at 1508.

Even if the use of Lawrence's land were partially limited to permit antelope passage to the federal domain, that would not "take" his property for four reasons.

A. There is no taking where Congress acts to protect its own property or abate a nuisance, as it has here.

The removal of Lawrence's fence is justified as an exercise of Congress' property power and/or of its police power to abate nuisances. In either case, the alleged secondary impacts on Petitioner's private lands are not a taking.

(i). *Property Clause power.* This Court has already held Congress may utilize the UIA as an exercise of its property power to protect federal land. Some impingement on adjacent private land is not a taking:

> The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public . . . to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage.

Camfield, 167 U.S. at 525.

The principle was recently confirmed in *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) ("regulations under the

Property Clause may have some effect on private lands not otherwise under federal control"). Where Congress acts to protect legitimate uses on federal land,[9] the accompanying impact on private land is not a taking.

(ii). *Police power.* The Tenth Circuit explained that removal of Lawrence's fence "did not impose a servitude for antelope, but rather, abated a nuisance proscribed by federal law." *Lawrence,* 848 F.2d at 1507. In addition to its property power, Congress' power to abate nuisances – by use of the UIA – is settled:

> Considering . . . the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual.

Camfield, 167 U.S. at 525. *See also Mugler v. Kansas,* 123 U.S. 623, 668-69 (1887) ("prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property"); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* ___ U.S. ___, 107 S.Ct. 1232, 1246 n.22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."); *Keystone,* 107 S.Ct. at 1256 ("We have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using

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[9] *See supra* notes 6, 7, and 8.

his property to injure others without having to compensate the value of the forbidden use.") (Rehnquist, J., dissenting).

Any doubt that enclosures of federal land were considered nuisances by Congress is resolved in the UIA's legislative history,[10] and by this Court's holding in *Camfield*.

B. There is no taking because Lawrence's property value was not diminished – it was likely enhanced.

Despite Lawrence's protest that abatement of the fence imposes a servitude on his private sections, he was unable to show any diminution of his property value from antelope. The Tenth Circuit wrote:

> [W]e can find nothing of Lawrence's that has been "taken". . . . [E]vidence at the trial indicated that competition between antelope and cattle was minimal . . . [and there was] also evidence in the record

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[10] The Committee on Public Lands of the House of Representatives, which reported the UIA, wrote: "This bill declares these inclosures unlawful; allows the citizen to abate them as *public nuisances*, a right the common law of England gives, and which has been exercised time out of mind." H.R. REP. No. 1325, 48th Cong. 1st Sess. at 7 (1884) (emphasis added). Representative Payton, the UIA's sponsor, stated the following to be the "facts in regard to the evil which this bill is intended to reach":

> [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands . . .

CONG. REC., 48th Cong. 1st Sess. 4769 (June 3, 1884).

> suggesting that foraging by antelope may actually improve the range for cattle.

Lawrence, 848 F.2d at 1507.

Lawrence's failure to show diminution of his property value is fatal to his claim his land has been taken. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.") (footnote omitted). *See also* Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 Harv. Envtl. L. Rev. 1, 66 (1987).[11]

C. There is no taking when compensation is available. Lawrence could apply for compensation under the state game damage law, but has not.

Even if antelope did substantially diminish the value of Lawrence's property, that would not mean his property was taken. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). In Wyoming, Lawrence could seek compensation for any verifiable damage caused by antelope. *See* Wyo. Stat. § 23-1-901 (1977). His failure even

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[11] Even had there been some loss of Lawrence's private forage to antelope, this Court has already refused to review a case holding that where wildlife use of private land does not destroy most of its value, there is no taking. *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 1616 (1987).

to file a damage claim under the statute means his assertion that antelope passage will take his property is at best premature, for "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson* at 195.

D. Antelope access across Lawrence's land is not a taking because their use is historic and necessary.

Lawrence's claim that the UIA imposes a servitude on his land presupposes a right to exclude antelope. This assumption fails in light of this Court's earlier holdings.

In *Leo Sheep*, 440 U.S. 668, 687 n.24, this Court recognized that traditional customary or necessary uses warrant a right-of-way across the private checkerboard, which might otherwise not exist:

> This distinguishes the instant case from *Buford v. Houtz*, 133 U.S. 320 (1890). The appellants there were a group of cattle ranchers seeking, inter alia, an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on even-numbered public lots. This Court denied the requested relief because it was contrary to a *century-old grazing custom*. The Court also was influenced by the sheep ranchers' lack of any alternative. . . . Here neither *custom* nor *necessity* supports the Government. (Emphasis added.)

Antelope use of Red Rim, unlike the new road in *Leo Sheep*, is an old custom predating private ownership of the land. The district court found that "[t]he antelope

grazed on the Wyoming big sagebrush at Red Rim long before the Daley Ranch was ever built, and unless driven to extinction, will graze there long after it is gone." *Lawrence*, 620 F. Supp. at 1420.[12]

Even if antelope did not have a customary and preexisting right to cross Lawrence's lands, they could claim a right-of-way by necessity. In *Leo Sheep* and *Buford* this Court was "influenced by the sheep ranchers' lack of any alternative. . . ." *Leo Sheep*, 440 U.S. at 687 n.24. In ruling the sheep ranchers had an implied license to drive their sheep across plaintiffs' property – the only route available to reach public grazing lands – this Court believed a rule preventing this would be "inconsistent with the habits, the interests, *necessities* and understanding of the people." *Buford v. Houtz*, 133 U.S. at 330 (emphasis added).

In this case there is no question that if antelope are to survive critical winters, they have no alternative other than to cross private lands to reach Red Rim.[13]

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[12] The district court's finding is ratified by the historic record – antelope used Red Rim well before the lands were transferred to private ownership in the Union Pacific Act of 1862: "Small herds of antelope" and "abundant signs of buffalo and antelope" were reported in 1850 fifteen miles south of Wamsutter [placing the sighted antelope within thirty-five miles of Red Rim]. In 1877, antelope were reported to be "very abundant" and "were very common in lakes around Lost Creek." (Lost Creek is approximately 60 miles from Red Rim.) R. Dorn, *The Wyoming Landscape, 1805-1878*, 27, 46, 48 (1986).

[13] The district court found the pronghorn had no alternative. *See supra* note 1.

CONCLUSION

For the above reasons, Respondents Wyoming and National Wildlife Federations respectfully ask that Lawrence's Petition for a Writ of Certiorari be denied.

November 1988

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-437

In the Supreme Court of the United States

OCTOBER TERM, 1988

TAYLOR LAWRENCE, d/b/a GRIZZLY AND DALEY RANCH, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in an area characterized by a checkerboard pattern of federal and non-federal ownership of alternating sections of land, a fence constructed entirely on the non-federal sections violates the Unlawful Inclosures of Public Lands Act, 43 U.S.C. 1061 *et seq.*, because it encloses about 9,600 acres of federal land and obstructs the free passage of pronghorn antelope over the federal land.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xvii-xxxviii) is reported at 848 F.2d 1502. The opinion of the district court (Pet. App. i-xvi) is reported at 620 F. Supp. 1414.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1988. A petition for a writ of certiorari was timely filed on September 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1 of the Unlawful Inclosures of Public Lands Act of 1885 (UIA), 43 U.S.C. 1061, makes unlawful all enclosures of any public land by any person without color of title to all the public land within the enclosure. Section 3 of the UIA, 43 U.S.C. 1063, makes it unlawful for any person, by force, threats, intimidation, fencing, enclosing or other unlawful means: (1) to prevent or obstruct any person from establishing a settlement under the public land laws or (2) to prevent or obstruct free passage or transit over or through public lands. The presence of an enclosure is therefore not essential to a violation of the UIA since the actions prohibited in Section 3 can be accomplished with or without an enclosure. As applied to fences on private land but enclosing public land, this Act is a lawful exercise of the constitutional power of the United States to abate a nuisance. *Camfield* v. *United States*, 167 U.S. 518, 525 (1897).

2. Petitioner Lawrence constructed a twenty-eight mile fence enclosing more than 20,000 acres of land near Rawlings, Wyoming (Pet. App. iii). The enclosed land is located in the checkerboard configuration of federal and non-federal ownership which is the legacy of the Union Pacific Railroad Act of July 1, 1862, ch. 120, 12 Stat. 489, §§ 3-4, 12 Stat. 492, as amended by Act of July 2, 1864, ch. 216, 13 Stat. 356, § 4, 13 Stat. 358. Under that Act, the railroad was patented a certain number of odd-numbered sections of land for each mile of track it laid while the even-numbered sections were reserved by the United States (Pet. App. iii-iv). Lawrence owns or has permission to occupy the odd-numbered sections within his fence (*id.* at iv). The even-numbered sec-

tions are in state or federal ownership (*ibid.*). About 9,600 acres enclosed by Lawrence's fence are federal land on which he holds permits to graze cattle for 60 days during each year (*id.* at xix).

Lawrence's fence is built entirely on private sections of land, except where it crosses common corners of state and federal land (Pet. App. xix). Lawrence's fence is not a Bureau of Land Management (BLM) approved fence[1] (*id.* at iv). It is about five feet high and made of woven wire with no gap at the bottom and is topped with barbed wire. It is designed to be antelope-proof[2] (*id.* at iv, xii). The fence is broken by 28 gates, 19 of which are unlocked; and at various locations "No Trespassing" signs are posted (*id.* at xii, xxxv n.13).

3. Within Lawrence's fence is an important geographic uplift known as Red Rim. This area contains an abundance of Wyoming big sagebrush which constitutes the major part of the diet of pronghorn antelope during the winter months. In addition, the uplifted area catches winds during the winter that expose the sagebrush in this area for the antelope when other areas are snow-covered. Portions of Red Rim have been declared by the Wyoming Game and Fish Department to be critical winter habitat for the pronghorn antelope herd in the Baggs, Wyoming

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[1] A fence built on public land would have to be approved by the BLM (see 43 U.S.C. 315c). An approved fence would be designed to allow antelope to crawl under it or jump over it (Pet. App. xx n.4).

[2] This fence was built ostensively to protect a crested wheat crop which Lawrence claimed he intended to plant (see Pet. 6). However, Lawrence has never planted crested wheat on the enclosed land (Pet. App. xiv).

area. The antelope have no alternative winter feeding ground. *Id.* at iii.

The winter of 1983-84 was unusually severe and the antelopes' access to the winter range in Red Rim was blocked by Lawrence's recently completed antelope-proof fence. Unable to negotiate this fence, the antelope collected along it and starved in their attempt to reach the critical winter range in Red Rim. *Id.* at xix.

To alleviate this situation, the Wyoming Department of Game and Fish, the Wyoming Wildlife Federation and the National Wildlife Federation (Wildlife Federations), and the Governor of Wyoming received permission from Lawrence to remove eight miles of his fence at the expense of the Department of Game and Fish. The fence was replaced in the spring, again at the expense of the Department of Game and Fish. This same process of removing, and then replacing, a portion of fence at the expense of the Department of Game and Fish to allow access by the antelope to this critical winter habitat was repeated the following winter of 1984-85. Stipulation of Material Facts, ¶ 18, attached as Docketing Statement (10th Cir.), Exh. B.

4. On April 11, 1985, the United States filed a complaint against Lawrence seeking a declaration that Lawrence's fence is an unlawful enclosure within the meaning of the UIA and an injunction compelling the removal or modification of the fence so as to allow unobstructed access for pronghorn antelope and the public to the public lands enclosed by the fence. The Wildlife Federations later intervened as party plaintiffs. Motion to Intervene filed April 25, 1985; Order of May 17, 1985.

Following a hearing on a motion for a preliminary injunction filed by the Wildlife Federations which was consolidated into a full hearing on the merits (Pet. App. ii), the district court orally granted the injunction on October 29, 1985. It ordered (*id.* at ii-iii) Lawrence to remove within ten days the portions of his fence which in the past two winters had been let down and to remove or modify to conform to BLM standards within sixty days all 28 miles of his fence. The court confirmed and further explained its order in written form on November 1, 1985, holding (*id.* at iv-vi) the case to be controlled by this Court's decision in *Camfield* v. *United States*, 167 U.S. 518 (1897). This Court there ruled that a fence surrounding a checkerboard area of publicly- and privately-owned land violated the UIA. The district court noted (Pet. App. v) that the *Camfield* fence, like Lawrence's, was built entirely on private sections but enclosed public land.

The court of appeals affirmed. It held (Pet. App. xxiv-xxxii) that the UIA prohibits the enclosure of public land (43 U.S.C. 1061) and the obstruction of access over public land necessary for any lawful purpose (43 U.S.C. 1063), including the management of federally-protected antelope, and rejected (Pet. App. xxxv-xxxvi) Lawrence's argument that the presence of gates prevented his fence from being an unlawful enclosure. The court distinguished (*id.* at xxiii) *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), in which the United States had claimed that it had reserved an easement over the privately-owned sections of land in a checkerboard area, on the ground that the present case involved simply the question whether the fence constructed by Lawrence unlawfully enclosed public land in violation of Sections 1 (43

U.S.C. 1061) and 3 (43 U.S.C. 1063) of the UIA. Like the district court, the court of appeals noted (Pet. App. xx-xxv) that the government's power to abate such a nuisance had been settled by *Camfield* in a case strikingly similar to the present one. The court also held (*id.* at xxvi-xxvii) that nothing of Lawrence's had been "taken," and noted (*id.* at xxvii-xxviii) that he retained the right to exclude antelope from his land if he could do so without unlawfully enclosing public land. Finally, the court rejected Lawrence's claim, in its various forms, that the passage of the Taylor Grazing Act, 43 U.S.C. (& Supp. III) 315 *et seq.*, distinguished his case from *Camfield*. Specifically, the court ruled that his Taylor Grazing permits did not give him color of title under the UIA (Pet. App. xxxii-xxxiii), and that his fence was an unlawful enclosure under the UIA even though it did not violate the terms of his Taylor Grazing Act lease since it is built on private, rather than leased, land (*id.* at xxxiii).

ARGUMENT

The decision below is a correct and straightforward application of this Court's holding in *Camfield* v. *United States*, 167 U.S. 518 (1897). It does not conflict with any decision of this Court or any court of appeals. Accordingly, review by this Court is not warranted.

1. The court of appeals correctly ruled that *Camfield* is controlling here. *Camfield*, like this case, arose because the defendants had fenced in an area of land characterized by the checkerboard public/private ownership that resulted from the Union Pacific Railroad Act land grants. Like Lawrence's fence, the fence in *Camfield* was built entirely on the

privately-owned odd-numbered sections of land in the checkerboard. And, like Lawrence's fence, the *Camfield* fence enclosed not only the private land but also thousands of acres of public land. At each section line, a swinging gate had been placed to provide "access" to the enclosed public domain land. The defendants denied any intention to monopolize the public land or to exclude the public. In addition, the defendants claimed that the fence was needed to carry out an irrigation project on the private land in the enclosure. *Camfield*, 167 U.S. at 519-521. This Court held (*id.* at 522) that the enclosure violated Section 1 of the UIA, which makes unlawful all enclosures of any public land by any person without a good faith claim or color of title to the public land enclosed. Despite the defendants' ownership of all the odd-numbered sections which were also enclosed, the claimed need for the fence, the presence of gates at each section or the disclaimer of any intention to exclude the public, the Court concluded (167 U.S. at 522) that defendants were "certainly within the letter of * * * [the UIA since] [t]hey did enclose public lands of the United States." It was sufficient under the UIA that public land had been enclosed by someone without claim or color of title.

The courts below found the facts here to be "virtually identical" to those in *Camfield* (see Pet. App. vi (district court), xix n.1, xxii (court of appeals, quoting and adopting findings of district court)). Petitioner does not challenge any findings of fact as clearly erroneous.[3] Rather, petitioner argues that

[3] Nor does petitioner press his argument, made in the courts below, that he has not violated the UIA because he has a good faith claim or color of title to the enclosed public lands in that he holds leases under the Taylor Grazing Act

this Court's subsequent decision in *Leo Sheep* v. *United States*, *supra*, modifies the applicability of the UIA to this situation as established in *Camfield*. That contention is refuted by the Court's opinion in *Leo Sheep* itself, which specifically stated (440 U.S. at 683) that "the Unlawful Inclosures of Public Lands Act of 1885 [is not] of any significance in this controversy."

The issue before the Court in *Leo Sheep* was whether the United States had reserved an easement that it could use to build a public road over the privately-owned sections of land in a checkerboard area. The Court found that the United States had not reserved such an easement; thus compensation was due the private landowners. The Court's holding that the government could not take private land without compensation is irrelevant to this case, which, like *Camfield*, concerns the obstruction of public lands by an unlawful enclosure.[4]

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allowing him to graze cattle there for 60 days per year. Insofar as he makes reference (see Pet. 15) to such a claim, however, it is insubstantial. As the courts below stated (Pet. App. xi, xxxii-xxxiii), the language of the Taylor Grazing Act itself negates petitioner's claim. See 43 U.S.C. 315b ("[T]he issuance of a [grazing] permit * * * shall not create any right, title, interest, or estate in or to the lands."). Further, the case law has consistently interpreted the good faith exception to the UIA to refer to claims of fee, rather than leasehold, title. See, *e.g.*, *Smith* v. *Third Nat'l Exchange Bank*, 244 U.S. 184 (1917); *Cameron* v. *United States*, 148 U.S. 301 (1893).

[4] There is no basis for petitioner's suggestion that *Camfield* is no longer good law (Pet. 22-23) and that the UIA is no longer operative (Pet. 18-19) because each belonged to an era when lands were open to settlement and common grazing. Congress did not limit its statutory prohibition of unlawful enclosures to those that interfere with settlement or grazing

2. Lawrence also argues (Pet. 15-22) that the court of appeals erred in finding that the UIA prohibits obstructions to the passage of antelope as well as people. He adds (Pet. 17) that, even if antelope are protected, his fence had gates in it and so cannot violate Section 3 of the UIA. His contentions are not supported by either the plain language of the statute or the case law.

Section 1 of the UIA, to which petitioner makes no reference, very broadly prohibits all enclosures of public lands without reference to what is fenced out of those public lands or to whether the enclosures have gates:

> All inclosures of any public lands * * * constructed by any person * * * to any of which land included within the inclosure the person

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rights, although protecting those rights was clearly a focus of the UIA (see *Leo Sheep*, 440 U.S. at 683-684). Rather, Congress declared "[*a*]*ll* inclosures of any public lands * * * unlawful" (43 U.S.C. 1061 (emphasis added)). Nor does petitioner cite any legislative history to support the claim that the statute effected a narrower prohibition than its language indicates. As the court of appeals held (Pet. App. xxx), there is no reason to read extraneous restrictions into the statute when the language of the statute is clear on its face. See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (language of statute ordinarily conclusive, absent clear legislative intent to contrary). In addition, Congress amended the UIA as recently as 1984 (see Act of Nov. 8, 1984, Pub. L. No. 98-620, Tit. IV, § 402(43), 98 Stat. 3360), which it would not have done had the repeal of the last homesteading acts in 1976 by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Tit. VIII, § 702, 90 Stat. 2787-2789, or the termination of open public range in 1934 by the Taylor Grazing Act, ch. 865, 48 Stat. 1269-1275, implicitly repealed the UIA.

> * * * had no claim or color of title made or acquired in good faith * * * are declared to be unlawful * * * .

43 U.S.C. 1061. The court of appeals rightly concluded (Pet. App. xxx) that petitioner's fence is clearly an "inclosure[] of any public lands * * * declared to be unlawful" by Section 1.

Petitioner eschews Section 1 to rest his claim entirely on Section 3 of the UIA (43 U.S.C. 1063). That section adds to the fencing prohibition in Section 1. It prohibits: (1) the prevention or obstruction by any means of any person from entering on public land subject to settlement or entry; and (2) the prevention or obstruction by any means of "free passage or transit over or through the public lands" (43 U.S.C. 1063). The court of appeals correctly concluded (Pet. App. xxx-xxxii, xxxv-xxxvi) that, despite the presence of gates, petitioner's fence is unlawful under this section as well because it "prevent[s] or obstruct[s] free passage or transit over or through the public lands" of federally-protected wildlife. The fact that the first clause of Section 3 speaks of preventing entry by "people" for purposes of settlement or entry under public land laws does nothing to limit the applicability of the second clause in Section 3 to the "passage or transit" of "people" only, just as it does nothing to remove the general prohibition of Section 1. The plain and broad language of Section 1 and the second clause of Section 3 should not be restricted absent clear legislative intent to do so. See *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983).[5]

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[5] Petitioner objects that the court of appeals' holding amounts to the seizure of private property for antelope (Pet.

The Tenth Circuit's holding accords with previous decisions. In *Camfield*, this Court interpreted Section 1 of the UIA to prohibit an unlawful enclosure without indicating that only enclosures infringing grazing or other specific rights would trigger the statute. Rather, the Court stated (*Camfield*, 167 U.S. at 526) more comprehensively that Congress has the power of legislating against a nuisance "for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection."

22-23), results in a drastic modification of property management (Pet. 19-20), and imposes a servitude upon patented private lands for the benefit of antelope (Pet. 22). These are merely variations of the argument that *Leo Sheep* should control this case. As the court of appeals correctly explained, "the district court did not grant the antelope any easement across Lawrence's private land, nor do we. That question is simply not at issue here. Instead, the issue in this case is merely whether the fence constructed and maintained by Lawrence unlawfully encloses federal law [*sic*]" (Pet. App. xxii-xxiii).

The power of the United States to abate the nuisance represented by a fence built on private land but surrounding public land was settled in *Camfield*. As the Court concluded there:

> The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the Government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and were bound to avoid obstructing or embarrassing it in such disposition. * * *

Camfield, 167 U.S. at 527. In short, while Lawrence may fence his own land to exclude antelope if he wishes (see *Camfield*, 167 U.S. at 528), the UIA provides that he may not

Indeed, in *Stoddard* v. *United States*, 214 F. 566 (1914), the Eighth Circuit interpreted Section 3 of the UIA to preserve not only the "free passage or transit" of people over public land but also that of cattle. Specifically rejecting the argument that Section 3 applies only to protect the passage of people, the *Stoddard* court held that the UIA was intended "to prevent the obstruction of free passage or transit for *any and all* lawful purposes over public land." *Stoddard*, 214 F. at 568-569 (emphasis added); see also *MacKay* v. *Uinta Development Co.*, 219 F. 116, 118-120 (8th Cir. 1914). The court of appeals here followed *Stoddard*, properly finding the management of public lands to provide forage for antelope a "lawful purpose." [6] The court in *Stoddard* also found (214 F. at 568) that the presence of gaps in the fence there did not cure the UIA violation, since the cattle could not pass through the gaps because of natural barriers. Likewise here, the court correctly found that the presence of gates could not cure the obstruction to antelope presented by the fence.[7]

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fence his land so as to effect an enclosure of the public lands. As the court of appeals noted (Pet. App. xxviii), "[a]ll that Lawrence has lost is the right to exclude others, including wildlife, from the public domain—a right he never had."

[6] The court of appeals found (Pet. App. xxxi-xxxii) the management of land to provide winter forage for antelope to be a lawful purpose of public lands by looking to the directive in the Federal Land Policy and Management Act that requires that "the public lands be managed in a manner * * * that will provide food and habitat for fish and wildlife and domestic animals" (43 U.S.C. 1701(a)(8)).

[7] *Golconda Cattle Co.* v. *United States*, 214 F. 903 (9th Cir. 1914) and *United States* v. *Johnston*, 172 F. 635 (C.C.

3. Petitioner further claims (Pet. 10-11) that the court of appeals held that the intent with which a fence is built is irrelevant to a UIA violation and that this holding is inconsistent with *Camfield*, insofar as it applies, and with Ninth Circuit case law.

The court of appeals' decision, however, did not rest on a holding that intent is irrelevant to a UIA violation. Rather, the district court in this case found (Pet. App. xiv) that both the *effect* and *intent* of the fence was to exclude antelope, a factual finding found (*id.* at xxix n.8) not clearly erroneous. Thus, the court of appeals concluded (*ibid.*): "whether Lawrence's intent in building the fence is relevant or not, the fence is unlawful under the UIA." Accordingly, the question whether intent is relevant to a UIA violation is not presented by this case.[8]

N.D. Cal. 1908), cited by petitioner (Pet. 17), do not cut to the contrary. In each case, the court simply found that the presence of long gaps in the fence at issue meant that the fence was not an "inclosure" for purposes of the Act. See *Golconda*, 214 F. at 909 (gaps from 90-3400 feet); *Johnston*, 172 F. at 636 (gaps of one-half to one mile).

[8] Moreover, the 1914 Ninth Circuit case cited by petitioner, *Golconda* v. *United States*, *supra*, does not, in any event, stand for the proposition that intent is a necessary element of a UIA violation. Rather, the court in *Golconda* held (214 F. at 904-905) merely that the existence of an intent to enclose public lands could be considered in the court's factual determination whether a particular fence was, in fact, an "inclosure" at all for purposes of the UIA. The court in *Golconda* correctly read (*id.* at 904) *Camfield* to consider a defendant's intent to the extent that intent helped to distinguish fences on private land that enclosed that land alone from those that enclosed public land or interfered with access to it. Cf. *Camfield*, 167 U.S. at 522 (finding defendants "within the letter of [the UIA]" without requiring in-

4. Petitioner also errs in contending (Pet. 14-15) that even if *Camfield* controls, the court of appeals has departed from *Camfield* in upholding the district court's order requiring modification of his fence to comply with BLM standards or removal of all 28 miles of his fence.

In *Camfield*, the district court ordered abatement of the nuisance created by defendants' fence by requiring removal of the entire fence. Brief of *Camfield* Appellants before the United States Supreme Court at 7, quoting from the district court decree, reproduced in Intervenor Wildlife Federation's Addendum B-13, B-16. The court of appeals here has affirmed the same remedy sanctioned in *Camfield*.

Moreover, under the UIA, the action required to abate a nuisance lies within the discretion of the district court (see 43 U.S.C. 1062). Because the fence constituted a prohibited enclosure, ordering modification or removal of the entire fence was well within the discretion of the district court, as *Camfield* demonstrates.[9]

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tent as element of offense where defendants "did enclose public lands * * * and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith * * *.") Considering the existence of intent to enclose land is thus a permissible approach, not a mandatory one. It is possible that the court in an even earlier Ninth Circuit case (*Potts* v. *United States*, 114 F. 52 (1902)) considered intent a mandatory element of a UIA violation, although it appeared to limit its holding to its facts (see *id.* at 55). In any event, the Ninth Circuit assumedly rests with its later conclusion. In either case, any conflict obviously occurs so infrequently that it does not warrant this Court's attention.

[9] Lawrence's contention (Pet. 14) that the district court is without authority to order removal of the fence that borders

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

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or "incloses" his own land or state-owned land which he leases ignores the fact that such a fence was *not* the enclosure litigated before the district court.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60757